METHODS OF REGULATION

Liora Salter
Associate Professor and
Chairman
Department of Communication
Simon Fraser University

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A REPORT

Liora Salter
Associate Professor and Chairman
Department of Communication
Simon Fraser University

with William Leiss, Professor, Robert Hackett, Visiting Assistant Professor, David Mitchell and Peter Anderson, Research Associates, Regina Costa and Amparo Cadavid, Research Assistants

Introduction

(i) The Task:

The Canadian Broadcasting System is in a period of transition. A number of appointed bodies, plus the Canadian Radio-television and Telecommunications Commission and the Federal Department of Communications, have responded to this situation by examing the options for change. Basic policy questions, the stance of the regulatory agency, the relationships between the many participants in the system and its basic goals have all been addressed in a number of research reports, public statements, proposed legislation and public hearings.

The task of this report within this context is quite specific. In almost all discussions of the changing state of the Canadian Broadcasting System it is assumed that regulation will continue to play a significant role in the implementation of public policy goals. This report examines this and other assumptions about about the role that regulation -- whether through the CRTC or any other regulatory approach -- will play in shaping the Canadian Broadcasting system.

It begins with a number of questions: What are the options for chosing among the methods of regulation? What are, or should be, the powers of the current agency? Are there

alternatives to regulation as conventionally practiced through an agency such as the CRTC? Is any significant measure of deregulation a reasonable possibility? What about "reregulation", defined as innovative schemes for achieving regulatory goals without the conventional regulatory agency? Are there aspects of the system that cannot be addressed through regulation, either as it has been practiced or as it might be reformed? In other words, what are the options available to implement government policy with respect to Broadcasting?

To answer these questions it is necessary to go behind the commonly accepted perceptions of regulation, in order to get a much better understanding of what actually happens when a regulatory -- as opposed to any other -- approach to policy implementation is taken. The differences between regulation and other approaches to policy implementation must be examined. We also need to investigate just how regulation is actually practiced now -- in other words, what choices regulators have when they regulate. It is necessary to identify the values inherent in different approaches to policy implementation and, indeed, in different forms of regulation. Finally, a study is required of the various mechanism of regulation that are at the disposal of an agency or a government seeking to achieve the goals we commonly associate with regulation.

(i) The Approach:

This search for an understanding of regulation leads us along two unfamiliar paths. First, it means that the investigation will not be centred initially on the Canadian Broadcasting System, but rather on some more general questions about how issues, such as those arising in broadcasting, can be addressed by government and various interested groups. Obviously the search will be relatively unproductive if the results of the investigation cannot be -- and are not in fact -- applied to the problems of broadcasting policy. The reader is asked to be patient. The exploration of the tools needed for developing, directing and controlling broadcast policy cannot proceed without a grasp of the tools at hand to accomplish the policy goals.

Second, it means that the investigation will not be centred immediately on the familiar debates about deregulation-regulation. From the perspective of this report, the question of whether one should or should not adopt a deregulatory stance is not the first order of business, although of course it will be important eventually. More important initially will be the task of determining just what options lie between the two end points or alternatives -- regulation and deregulation. Or indeed, just what does either regulation *or* deregulation mean in practice? Again, the investigation must return to the question about how to regulate the Canadian Broadcasting System, but only after it becomes clear about what the range of choices really is.

(iii) The Research:

The research for the report extends beyond that commissioned for the Task Force on Broadcasting. The authors, either individually or collectively, have been engaged in a number of studies of regulation and policy making, including several that have been designed to produce policy recommendations for government departments such as Agriculture Canada and Environment Canada. The material used for the report draws upon these studies (noted in the bibliography), a literature on regulation that includes studies of regulation in sectors of the economy other than broadcasting, some more general theoretical material on regulation and several previous reports for the CRTC and the Department of Communications.

The report provides an analysis of regulation from several different perspectives. First, the common characteristics of regulation are identified and the advantages of a regulatory apporach are identified, so that the choice of whether to use regulation can be an informed one. Regulation is then distinguished from quasi-regulation, programs designed to achieve the same objectives of regulation without the creation of a regulatory authority. Again, the advantages of quasi-regulation are described to provide a basis for informed choice.

The decision about how to regulate involves value choices as well. Three different philosophical orientations can be identified, each creating a its own framework for regulatory decisions. In effect, governments must decide whether they wish to use regulation to provide benefits, establish and enact rights or sustain social values.

The different methods of regulation are characterized in three ways. First, regulation takes a variety of forms, including the simple application of rules, permit granting by government departments, the use of tribunals or involving direct mediation of interest group conflicts. In recent decades a shift has occurred. Greater reliance has been placed on regulation by tribunals, leading the the wide-spread perception that the amount of regulation by government is increasing. More recently, the emphasis has been placed on political accountability and regulation by mediation of various interests. In both cases, the independence of tribunals has been compromised. Finally, regulatory authorities differ widely in their institutional design. The various choices are discussed in terms of how they affect the decision about who should regulate, the mandate for regulation, the method for implementing regulation and regulatory enforcement

(iv) The Recommendations:

Finally in this introduction, it is important to say something about the recommendations. There is a need to affirm that we have the capacity to begin anew, to devise a regulatory scheme -- or alternatives to regulation -- that is tailored to today's needs and problems. Even if such proposals seem naive in light of the established precedents in the regulation of the Canadian Broadcasting System, they provide a vision of what can be accomplished and a benchmark against which to measure other proposals for change.

The recommendations provided in this report are structured in two parts, then. First, we will propose a series of measures that assume a blank slate, an opportunity to begin again in devising a scheme for implementing broadcasting policy. Second, some recommendations will be proposed that demand no changes in the existing structure of broadcasting regulation. Each set of recommendations is a package, complete in itself. It would run contrary to the

intentions of this report if individual recommendations were drawn out of the "sets", since the recommendations in each constitute a plan for reform.

Chapter One

Defining Regulation

(i) The perspective:

There is now an extensive literature on regulation.[1] A useful perspective on regulation is to view it as one of a number of possible governing instruments.[2] Governing instruments are defined as the means used by governments to implement their policies. Taxation policies education programs, crown corporations, fiscal programs and regulation are all examples of governing instruments. In some senses they all function as substitutes for each other. They all represent reasonable approaches that governments might take to carry out their mandates.

Two examples will help illustrate how different govering instruments function as substitutes for each other. First, regulation has been criticised for imposing a tax on industry through regulatory measures that demand compliance with social, rather than market-related, goals. The community channel on cable is said to be such a tax, since it represents a financial contribution paid by cable companies from the profits of their more saleable services to achieve a social goal. Some commentators have argued that this "tax" supporting community programming should be replaced by a formal taxation scheme, just as a formal tax on cable revenues now supports Canadian broadcasting program production. Should their arguments be accepted, the governing instrument of regulation would be replaced by a different governing instrument, namely a specific taxation program.

Similarly, it is government policy to provide services to remote areas of Canada. Currently this policy is implemented partly through regulation. Both satellite and cable companies must provide service to the more remote areas within their licenced area, even though provision of those services is uneconomic from the company's point of view. In this case, either a special taxation scheme, a program for financing service to remote areas ,or a specially mandated or even a Crown corporation could be used to achieve the same goals as

regulation does.

As with any other governing instrument, regulation can be pursued vigorously or left mainly as a symbolic exercise. As is the case with other governing instruments, regulators have access to number of measures -- ranging from education programs, persuasion and exhortation, to active efforts to enforce policies, impose penalties for non-compliance, or tc initiate particularly desirable activities. Like any other governing instrument, regulation can be more or less coercive, depending upon the form it takes.[3]

(ii) The Distinguishing Characteristics of Regulation:

In order to understand why regulation might be chosen or disgarded as an instrument of government policy, then, it is important to note the specific character of the regulatory approach -- in other words, what is gained and lost by the choice of regulation as opposed tc any other governing instrument. Regulation has its own particular character. Its common characteristics enable regulatory authorities to function particularly effectively in some situations and to limit their scope of action in others. Identification of these common characteristics is essential if regulation is to be compared with other governing instruments. They are, as follows:

1. Regulation involves a **formal (and usually legal) designation of authority** to a specific body (tribunal, officer or other body). [4] The regulatory activities are separated out from the daily activities of a government department even when the same governmental officials perform both regulatory and non-regulatory roles. Although only some regulatory bodies can be said to be quasi-judicial in the legal sense of the term, the formal designation of regulatory authority to a recognizable body provides a structure within which decisions can be viewed as quasi-judicial in effect (if not in law), and within which a process of arbitration of interests can take place.

2. Regulatory authorities are in a special position. They are **similtaneously inside**

and outside the government. On one hand, they are sanctioned (and indeed often employed) by government and often serve to implement policies that are set by government. At the same time, they function with at least the appearance, and usually the status, of an independent unit. Obviously, some regulatory bodies are more independent of the line functions of government departments and political pressures than others. And no regulatory body, no matter how fiercely independent, is ever fully insulated from the pressures of executive and legislative politics. The point is, however, that the separation of the regulatory function from other governmental functions within government -- or the separation of regulatory authorities from government proper -- is supposed to imply that some form of independent judgement can take place. If nothing else, this separation creates the expectation of independence.

3. The effect of dividing regulatory authorities from the mainline functions of government is to create **a separate zone of governance.**[5] And because regulatory decision making takes place within this separate zone of governance, it has some unique features that further distinguish it from other instruments of policy implementation. The most important of these distinguishing features is that those making decisions and those affected by them are bound together in a continuing relationship.[6] Any regulatory authority has responsibility for decisions that affect a discrete segment or sector of the economy. Those active in the sector must return again and again to the same authorities for a sanction of their activities. This continuing interaction of regulator and regulated creates its own dynamics. Often it is referred to as "capture", but in fact the phenomenon is more complex than reference to the "captive" nature of regulators would suggest. The continuing interaction of regulator and regulated creates an inevitable mutuality of concern, a common definition of issues and problems and of the process of decision making, even when agencies are not "captured". Outsiders are often excluded by the "clubby" nature of regulatory proceedings; a specialized language is created; even advocates and public spokespeople get drawn into the specialized view of what should be addressed through regulation.

4. Regulation is also different from other governing instruments in that it takes very **different forms, even within the same regulatory authority.**[7] Departmental officials

(backed or not by an appeal board), consultative committees, permanent inquiries and regulatory tribunals sometimes have similar powers and mandates and conduct similar activities. Even self-regulation or professional regulation is a form of regulation, even though it exists outside government proper because it is usually conducted with the sanction of government authorities and under the threat of more conventional regulation should it fail. Regulatory agencies sometime depend upon professional or voluntary self-regulation to accomplish some of their goals.

6. **Regulatory procedures also vary considerably**, at least in Canada.[8] Indeed, the question of how policies are to be implemented -- with or without specific regulations, fo example -- is often left up to the regulatory authority to determine. Sometimes public hearings are held in conjunction with regulation, sometimes not. Some regulatory authorities provide funds for intervenors or have an active consultation process. Others do not. Some permit examination of the documentation leading to a decision; others keep relatively little documentation and no public record. Even when the procedures to be followed in regulation are set in the legislative mandate establishing the regulatory authority, significant areas of discretion remain about the design and implementation of those procedures. In other words, regulation is one of the more flexibly applied means of policy implementation.

6. Regulation can best be characterized as **a process of negotiation,** and regulatory decisions are usually negotiated ones. [9] This situation is created by a number of factors: (i) the flexibility of regulation provides those with a regulatory mandate the scope to vary their activities in response to some different situations; (ii) that regulation creates a separate zone of governance means that those operating within it have considerable latitude to establish the rules of the game and to alter those rules as necessary; (iii) since a great number of decisions affecting the same parties over a lengthy period of time are usually involved, it is often possible to trade good will about one decision for compliance with another; (iv) finally, because regulators have responsibility for regulating many aspects of activity within a sector and because compliance cannot be forced on a continuing basis when those involved have significant economic power, regulation often involves a series of duties and obligations that can be "traded" against each other to achieve a relatively harmonious relationship between

the government and the governed. The negotiations that characterizes regulation, then, involve not only questions of enforcement, but also access to benefits provided by regulation (or beneficial policies enacted by regulatory authorities).[9]

7. Regulation is distinguished from many other governing instruments by virtue of the explicit **inclusion of a technical assessment** in regulatory decision making. The development of regulation is traditionally defended because regulators develop and draw upon expertise about the sector they are regulating. This expertise is of several kinds: the technical capacities of the operations being regulated, the economic conditions affecting market transactions and the allocation of costs under regulation, and occasionally, the social and economic impact of the decisions to be made. Thus, for example, in telecommunications, the CRTC is expert in the technical capacities of telephone innterconnection, commissions studies on the allocation of costs and considers research on the impact of regulatory measures on senior citizens before arriving at a decision with respect to a rate increase. Regulatory authorities are expected to take public well-being into account in making decisions or applying regulations. They are expected to determine the nature of this well-being not only through a compromise of interest group pressures but also through a technical or expert assessment.

8. Finally regulation can be distinguished from other means of policy implementation by virtue of the fact that **regulatory agencies are reactive**, not pro-active in their orientation to policy implementation. This is not to say that regulatory authorities avoid policy decisions. Of course they do not. Regulatory authorities make policy either explicitly o implicitly through a series of case-by-case decisions that reflect a consistency of approach. Rather, in regulation, policies can be implemented only through stimulating the actions of others -- those in the regulated sector. Take the example of the CRTC's FM policy, often considered a highly pro-active policy initiative. Through this policy, the CRTC sought to distinguish FM from AM and different FM stations from each other. But because the CRTC is a regulatory agency, it could only achieve their stated policy objectives by soliciting initiatives from those it regulates and approving some, but not all applications that come before it. Regulatory authorities can offer incentives (in the form of protection of markets, for

example) or disincentives (in the form of regulations) but they cannot themselves take action Would the CRTC have been more successful, one wonders, if it simply had gone into the business of funding or even establishing FM stations? The question is not entirely facetious.

9. Regulation can be distinguished from equally complex systems of policy administration inasmuch as only regulation is **designed to highlight the rule making and rule-applying aspects of policy implementation.** Like taxation schemes and the civil courts, regulatory authorities must possess the means of setting rules that apply in specific circumstances or to particular classes of individuals or groups. Unlike them, regulation normally is accompanied by a formal process of rule making, not just a formal process of applying rules.

10. Although many public corporations are regulated, **regulation is oriented to the market and to private enterprise.** Most regulatory theory focusses on the control of natural monopolies in private markets or other forms of market failure; regulation today is often used to stimulate competition-like forces in markets. Regulatory agencies often demand commitments of those they regulate to some public benefit. They do so knowing that regulatory decisions often distort the operation of market forces. Even here, the assumption is that regulation constitutes a form of intervention in market forces and a re-direction of decisions taken by the private sector.

(iii) The advantages of regulation:

There are good reasons why so many regulatory authorities are created, even given the current popular deregulatory sentiments. These reasons must be understood, even by those who oppose regulation as a means of implementing government policy, so that the choice of governing instruments can be an informed one. These reasons can be summarized, as follows:

1. Because regulation encompasses the same participants in a long term relationship of governance and because so many issues are subject to negotiation through regulation, regulation provides continuity and a framework for handling a large variety of different issues simultaneously and a number of different means of solving many problems. Regulation normally provides a sophisticated scheme for the administration of complex policies.

2. Because regulation can be a very flexible instrument of policy implementation, the regulators can take a variety of different conditions into account and usually relax general regulations when the situation calls for flexibility. For example, regulatory agencies often have significant discretion with respect to their procedures and the detailed specification of their mandate through individual decisions.

3. In situations where compliance from the private sector with government policy usually cannot be forced but must be negotiated -- when for example, a number of different actors from the private sector are involved -- the broad scope of regulation generates the conditions for the large number and variety of incentives and disincentives necessary to achieve co-operation. Of course, different regulatory authorities have different access to sanctions with respect to the violation of their regulations.

4. Because regulatory bodies are quasi-judicial in approach (and sometimes legally) and operate as a separate zone of governance, they provide a mechanism for a negotiation of private interests and for the management of interdependencies between and among various sectors and government. Traditionally, this feature of regulation has been tied the insulation of regulation from the legislative and executive functions of government. With regulation, governments can be involved, yet also not involved, in settling distruptive disputes within or between sectors of the economy. A good example is the role played by the CRTC in mediating conflicts between cablecasters and broadcasters.

5. Because regulation generally is intended to be in the public interest, and the public expects that a technical assessment will be done before decisions are made, regulatory

agencies can often provide significant expertise in solving problems of public policy and can balance rational planning efforts against the inevitable negotiation of interests that accompanies political decision making. Often their contribution is in terms of determining whether certain proposed activities are feasible.

6. Because regulatory authorities are reactive, they represent an approach to government planning that is only *indirectly* interventionist. Regulatory authorities can impose rules and even, from time to time, enforce them strictly, either because there is a special demand or as a last resort. But regulatory agencies cannot operate directly in the marketplace or as if they were police and courts. They depend too much on the co-operation of the regulated to initiate actions that fall within the rules or reflect the goals of public policy. Co-operation between the regulated industries and the government is essential if regulatory planning and initiatives are to succeed.

7. Finally, because regulation is designed to highlight the rule-making and application functions of policy implementation, regulatory decisions are often more open to public scrutiny and debate than, for example, are taxation decisions. Moreover, the legitimacy of regulation requires agencies to be, or seem to be, responsive to a variiety of factors beyond those raised in the public hearings. For example, even if no native groups were to have testifed about the introduction of satellite service in the north, it is probable that the agency would have considered -- as they did -- the implications for native people of the introduction of new television service. Regulatory decisions are even more open, by and large, to public debate than those of the courts. Although the courts must maintain a public record (some regulatory agencies are legally a type of court; others are not), only with regulation is it generally assumed that members of the public, or at least all interested groups, should have direct and formal input into each decision.

(iv) successful regulation:

What does it take to create successful regulation, aside from a reasonable degree of

political will and public spirit on the part of the regulators and a moderately co-operative industrial sector? The answers are never clear, but some indications can be gained from the characteristics of regulation described above.

First, since regulation creates a scheme for the administration of government policy within a sector of the economy, regulation could not be expected to work well if only some segments of the industrial sector to be regulated fall under the jurisdiction of the authority. In other words, successful regulation requires a comprehensive approach.

- The existence of different rules for the regulated and non-regulated portions of the sector will introduce at least the appearance of unfairness.

- It will force regulators to relax their rules in order to gain co-operation from those they do regulate.

- Regulatory duties and benefits will promote unfair competition in markets, since only some of those active in the market will be subject to the subsidies and constraints introduced through regulation. This will reduce the effectiveness of regulation.

Second, regulation could not be expected to work in its own terms if the regulated and non-regulated activities of any company are not clearly distinguished or distinguishable. There is a need for an explicit set of objectives.

- Confusion over the status or applicability of rules leads to greater problems in achieving compliance.

- Significant cross-subsidies from the regulated to non-regulated sector occur because appropriate cost separations cannot be done.

- The entities in the unregulated segment increasingly encroach upon the activities ir the regulated sphere when competitive opportunities existed.

Third, regulation cannot be expected to work if resources are not made available for th development of technical expertise.In effect, it must be determined whether forecasts are accurate.

- Without the technical or expert capacity of regulators, the planning capacity of regulation is largely symbolic.

Fourth, the relative flexibility of regulation can be an advantage or disadvantage.

- Flexibility in regulation generally does not encourage public confidence, since a flexible decision is one that often fails to meet the stated rules or criteria.

- Too often, the result of flexible regulation (some agencies are more "flexible" than others in the application of their regulations) is that regulation comes to be viewed as a symbolic function of government, an indication that appearance of compliance is more important than its substance.

- Flexibility also becomes a problem when a regulator has multiple policy goals to implement through regulation. In the pressure of decision making, when so many possible goals are at stake, it is easy for regulators to lose track of the goals of regulation, or to compromise some goals in order to achieve others

Finally, regulators cannot be expected to succeed if their main task becomes the simple arbitration of private competing interests, (the regulator as "policeman"), since the question

is too easily raised about the purpose of the exercise. The public benefits to result from regulation need to be identified adequately and pursued in a public and convincing manner.

- If regulation exists simply as a forum in which private interests can negotiate their share of the market, the argument for deregulation -- for letting the market function as the regulatory system -- is overwhelming.

- Without a strong policy mandate, regulators become gatekeepers to the marketplace, for no apparent reason other than to ensure that markets function effectively. But, of course, with regulatory intervention, markets, by definition, are less free than they otherwise would be.

- A strong public mandate, accompanied by strong political and public support, often brings the regulator and regulated into conflict, yet it is necessary if the intervention is to be seen to have any significant purpose.

(v) self-regulation or quasi-regulation:

Where do the so called "self regulatory" approaches -- the use of voluntary codes, special levies, special taxation programs, contracts or other measures to gain compliance from industry for public policy goals -- fit within this description of regulation? [11] These measures are often viewed as substitutes for regulation, and there is merit in such a view. Nonetheless, we chose to include them within the ambit of a discussion of regulation, and indeed to call them "quasi-regulation". There are several reasons for including them in a discussion of regulation.

First, like traditional regulation, these special schemes are oriented to the intervention in the market and to private enterprise. They do not substutute government initiative for private enterprise, but seek to control and manage private enterprise in a manner condusive to furthering public goals. Oftem, like regulation, they are designed to offset the negative consequences of monopolostic practices or the negative consequences of a freely operating

market. Like regulation, also, they may be designed to ensure the orderly management of several interrelated economic or technical developments . For example, one might use either regulation or "quasi-regulation" to promote competitive-like pressures in a market (for example by providing specific subsidies and incentives for new entrants), to provide benefits to the poor or promote health and safety, to to ensure that a new hydro project conforms to public objectives (through special taxes, for example).

Second, although oriented to market relations, these measures involve government action. Even voluntary codes, which do not involve government officials directly, are often implemented through legally designated bodies or have an unofficial seal of government approval. For example, the codes adopted by broadcasters with respect to violence in television programming are "voluntary" but might be enforced by the CRTC, or are used by the CRTC in its supervision of broadcasting licensees. Moreover, voluntary codes are often replaced by conventional regulation, should they fail to achieve the objectives more commonly associated with regulation.

Third, even voluntary standard setting bodies -- and certainly the other measures listed above -- operate, like regulation, through a series of incentives and disincentives designed to encourage or discourage the behavior of others. Like regulation, then, these measures are often involve active negotiation between the regulator and regulated.

Fourth, if regulation is distinguished in part by its flexibility of approach and procedure, the number of different mechanisms that are seen as substitutes for regulation should not be itself be a reason for distinguishing them from regulation. .

But only some of these measures involve the creation of a separate zone of governance, a quasi-judicial structure, or the application of technical expertise in decision making, which are the other common characteristics of regulation. And other special mechanisms do not involve the same participants in a continuing relationship such as that established in

regulation. As well, in the policy debate, these mechanisms are often seen as substitutes for regulation, not forms of regulation in their own right.

It will make sense, then, to distinguish measures such as special levies or taxes, subsidy programs etc. from regulation, as it has been described here, in spite of the common characteristics of both. We chose to call these measures "quasi-regulation", to distinguish them from regulation as commonly understood, but to include them under the umbrella of regulation for the purposes of comparing different approaches. These new measures are regulatory only in the sense that they are designed to achieve comparable objectives and tha they share some of the characteristics of regulation. At the same time, these initiatives are not regulatory, in the sense that they are distinguished from regulation in the public debate and that they differ considerably from some of the common characteristics of regulation. The variety of measures called quasi-regulation will be discussed here in terms of their common characteristics, and will be distinguished later in this report, as possible substitutes for each other.

(ii) the characteristics of quasi-regulation:

Many of the characteristics of regulation also apply to quasi-regulation. For example, both quasi-regulation and regulation operate through a system of incentives and disincentives that are designed to persuade, rather than to force compliance with government policy. Both regulation and quasi-regulation are relatively non-interventionist in the sense that, for both, action is taken only through setting conditions for the behavior of others. In neither case are initiatives in the marketplace taken directly.

Quasi-regulation has some different characteristics from regulation, however. These are, as follows:

1. Quite often with programs of quasi-regulation, there is a formal delegation of authority to carry out a policy initiative to a specific body, but no separate zone of

governance is created. The example of a special taxation program is a good one, since it is administered through Revenue Canada as part of the general process of taxation rather than by a separate agency. (On the other hand, if a special fund is to be set up to carry out initiatves implementing government policy, such as Telefilm Canada, then this fund has many of the characteristics of regulatory authority, despite the fact that it is not regulatory in orientation.)

2. **Conflicts within or between sectors in the economy are resolved under programs of quasi-regulation by differential access to the incentives and disincentives.** Quasi-regulatory bodies do not serve the purpose of providing a quasi-judicial style forum for the arbitration of conflicts within a sector. At the same time, however, it is the powerful or well-organized and well-connected interest groups that are most likely to avail themselves of the incentive benefits provided through a quasi-regulatory scheme. Similarly, the more powerful interest groups are, the more likely they can exempt themselves, formally or otherwise, from disincentives applied through quasi-regulation.

3. Regulation is noted for its flexibility of form and procedure. In contrast, **quasi-regulation can be highly flexible in its application, but considerably less so in terms of the decisions about the rules or procedures themselves** with which the program operates. The rules are generally laid down in legislation and subject to change only with some difficulty. The broad negotiations which characterize regulation are replaced in programs of quasi-regulation by specific negotiations about incentives and disincentives.

4. With programs of quasi-regulation **technical or expert assessment is limited to the eligibility of various groups for the incentives or disincentives** or the level of compliance achieved. The rational planning capacity inherent in at least the theory of regulation is eliminated, or rather placed in the hands of the legislators who originally put programs of quasi-regulation into place. Continuing expertise of a technical nature to determine the nature of the public interest in any specific decision is seen to be unnecessary.

5. **Quasi-regulatory schemes usually have one public interest goal rather than many and one specifically targetted group as a mechanism of influence.** A special taxation scheme will be designed to support a single identifiable public purpose, for example, and one group will be singled out as the primary beneficiaries of the government policies being implemented through programs of quasi-regulation.

6. **This public interest goal in programs of quasi-regulation is usually made quite specific and thus is dependent upon active enforcement, the allocation of resources for the designated purpose and continuing commitment by legislators.** The effect of regulation and quasi-regulation is quite different. Cross-subsidies that are created by regulation, specifically for the purpose of achieving public interest goals are identified and eliminated by quasi-regulation. Subsidization of public interest goals under programs of quasi-regulation, then, becomes a matter of choice, a decision to be made explicitly when programs are enacted, funded or enforced. For example, the community channel on cable is now cross-subsidized by cable revenues. Were this cross-subsidy to be removed, a decision would have to be made -- and enforced -- to create a special funding program for community access to cable. Similarly, to the extent that cultural producers receive support from the cross-subsidies introduced by the regulation of Canadian content, an explicit decision would have to be made to continue their support, were deregulation of Canadian content to be enacted.

7. Since programs of quasi-regulation are seldom, if ever, public in their implementation **accountability in any program of quasi-regulation is achieved in its original enactment but not generally through the mechanisms of its implementation.** For example, it would be hard to conceive of a taxation or subsidy scheme in which the decisions were made within a public forum or even a public record kept of the procedings. Instead of an accountability engendered in a public hearing process, quasi-regulation is made accountable in the sense that legislatures play a highly active role in specifying the goals of the program of quasi-regulation.

(iii) the advantages of quasi-regulation:

Programs of quasi-regulation appeal to the spirit of the times and indeed have a number of features to recommend them.

1. Because they usually involve the dismantling of discredited regulatory authorities, new programs of quasi-regulation effectively counter some of the criticisms of regulation.

2. Because they are usually designed to meet a single policy objective, programs of quasi-regulation can be evaluatated more easily than regulation.

3. Because they are enacted by legislatures who specify clearly the intent of the program, they are less likely to be compromised by many competing objectives, and more likely to reflect the intent of the representative bodies who create them.

4. While still reactive and interventionist, programs of quasi-regulation structure market behavior only indirectly (by creating incentives and disincentives) rather than by acting to alter the structure of the market itself. Thus they are less likely then regulation tc reflect a rationalist planning orientation.

5. Because programs of quasi-regulation seldom operate within a separate zone of governance, the question of regulatory capture does not arise, although the influence of powerful lobbies *is not* diminished in this scheme.

6. Finally, because programs of quasi-regulation have a single goal and a single mechanism of action, they are often said to be cheaper to administer and require much less in the way of administrative rule-keeping and record maintainance than regulation does. The reason for this simplicity is that a relatively small portion of behavior is being monitored or influenced through any quasi-regulatory scheme. Successful compliance is sometimes easier to determine.

(iv) successful quasi-regulation:

Like regulation, programs of quasi-regulation will be more successful under some conditions than others. First, since programs of quasi-regulation seldom involve a technically expert assessment in the design of rules, they cannot be successful when decisions require scientific assessment.

- Questions of human health and safety or the protection of the environment often require just such continuing application of scientific expertise.

- Quasi-regulatory schemes make no provision for continual changes in the basic technical or scientific information used to design the application of rules.

- Questions of quality of service or product are not easily addressed by programs of quasi-regulation, since technical expertise and broad overarching judgements are necessary to determine questions of quality.

Second, quasi-regulation cannot be expected to succeed when multiple policy goals are involved:

- Since programs of quasi-regulation usually have one goal and one mechanism of action, a variety of such programs are needed if many policies are to be implemented.

- This variety of different programs reduces the cost efficiency of quasi-regulation and the simplicity of its administration.

- Programs of quasi-regulation are not designed to deal with the causes of market

failure or with structural problems in market relations. They are not easily applied, for example, to problems of competition, monopoly or the provision of diversity in product choice.

Third, since programs of quasi-regulation work through incentives and disincentives, compliance with policies ceases to be a duty (albeit one offset with the benefits achieved through regulation) and becomes a matter of additional negotiation.

- Taxation schemes are notorious for affecting various segments of the population differently. There is no reason to believe that a special taxation scheme, tied to a program of quasi-regulation, would work otherwise.

- Problems of influence-peddling do not disappear with the enactment of programs of quasi-regulation designed to replace what are reputedly captive regulators, since influencein quasi-regulation is exerted in gaining access to or freedom from various incentive or disincentive programs.

Fourth, quasi-regulation cannot provide public assurances of fairness.

- Programs of quasi-regulation seem initially easy to justify publicly since they link policy goals with mechanisms of action.

- Because they are seldom procedurally fair in their implementation, they are likely to attract significant criticism once they are in place . Too easily, these programs of quasi-regulation can be seen as highly symbolic.

- Programs of quasi-regulation are not effective as mechanisms for handling the resolution of disputes between interest groups within or between sectors.

Finally, quasi-regulation is designed to function in tandem with effective market relations and in relation to the private sector only:

- Policy goals for public corporations cannot be achieve through measures of quasi-regulation.

- Quasi-regulatory measures are ineffective in coordinating public and private sector initiaives.

(vi) the choice between regulation and quasi-regulation:

It is easy to think of the choice between regulation and quasi-regulation as one between regulation and deregulation. This is partly because the quasi-regulatory options have been presented by their advocates as deregulatory in intent. As is evident from the analysis offered above, the choice is not that simple. Both quasi-regulation and regulation are governing instruments. Both are means of implementing government policies. Both are designed to work in market societies but have effects on the market transactions, and from a strictly economic point of view, both introduce inefficiencies in those transactions. Regulation is not always so interventionist as is commonly believed; programs of quasi-regulation can be highly interventionist in operation.

Quasi-regulation and regulation differ considerably, in spite of their common characteristics, in terms of how they structure the relations between the regulators and regulated. Quasi-regulation is more like a legislative program; regulation is more quasi-judicial in orientation. What this means in practice is that quasi-regulation is accountable to legislatures but regulation can be both procedurally and politically accountable. For this reason, quasi-regulation might be easier to defend publicly than regulation *at the time when it is enacted* or when basic goals of public policy are being re-examined. Regulation, on the other hand, is easier to defend as being accessible,

procedurally fair, as creating decisions based on a public record and in some senses, and ususally as being politically accountable as well.

Nonetheless, different situations do call for a choice between regulatory and quasi-regulatory measures. A comparison of the results achieved with the Canadian film policies (which are quasi-regulatory in design), with broadcasting regulation provides a good example of the choices to be made.

Under the regulatory mantle of the CRTC in broadcasting, a number of measures have been introduced to strengthen the hand of cultural producers. These include (among others) Canadian content regulations, the FM policy, the Pay Television licencing decisions, and specific licence renewal decisions (in the form of conditions on licences) requiring support for cultural production from broadcasters. In some periods of the industries' development. and in the case of some sectors of the broadcasting industry, these measures have had some success. The Canadian content regulations have been widely credited for the development of an indigenous music production industry in Canada. Nonethless, few critics would suggest that regulation has produced adequate support for cultural producers.

The important point, from the standpoint of assessing regulation however, is not whether any one of these measures has been completely successful, but whether, taken as a whole, they have succeeded in pushing a reluctant private industry further in support of cultural production than it would have gone without regulation. Within the framework of regulation, compliance at any one time, or with any particular measure, can be traded by a broadcaster for particular benefits derived from regulation. The panopy of measures provides the agency with scope to negotiate, to coerce and convince those they regulate that support for cultural production is required.

Film policy is much simpler. Using several different programs of quasi-regulation, the government has provided incentives for Canadian film production. Having a single goal in this case, and a single target population, has contributed to the success of these programs. Even film policy requires a complex administrative apparatus, however. Although not an

agency in the traditional sense of the term "regulatory agency", Telefim Canada does perform similar administrative tasks. Questions of influence peddling in film support arise, although few now claim that Telefilm Canada is "captured" in the manner that a regulatory agency might be "captured". The decisions made by Telefilm Canada are not public ones, in the sense of being vetted in public or open to public debate. And the recipients of aid from Telefilm Canada are precisely that, recipients of aid. They acknowledge their dependence upon government largesse to provide the necessary tax and other incentives to support film.

It is ironic that many of the films made under the programs of quasi-regulation are not designed for a Canadian audience and, at least initially, are Canadian only in a narrowest sense of the term. While film policy has undoubtedly been a success, this success can be gauged more easily in terms of the relative health of a particular industry, as an industry, than in terms of cultural production more broadly defined. Perhaps the best way to put it is to say that the single goal of the program of quasi-regulation in film is industrial development. Had the goal been cultural development, a much more complex matter, it is questionable whether the programs of quasi-regulation for film would have been demonstrably more succesful than the regulation now used for broadcasting.

The point of the comparison is simple. If indeed, the purpose of public policies can be narrowed to a single identifiable goal (with a single identifiable target population who is to benefit), then programs of quasi-regulation are preferable, especially given the high level of public cynicism about regulation that exists. Programs of quasi-regulation permit governments to define their intentions clearly and narrowly and to assess how successful their efforts are as the program of quasi-regulation develops. If, on the other hand, the objective of public policies is a complex one, or indeed, if many goals are involved, then the broad scope of regulation is necessary if compliance with public policy is to be negotiated with industry.

This is not to say that *only* regulation will serve the public interest in the case of broadcasting, even though there are many complex goals for public policy in broadcasting. Rather, it may be possible either to split up the many goals of the CRTC into smaller, simpler

objectives and to consider programs of quasi-regulation instead of, or in conjunction with, regulation to accomplish these more easily targeted single objectives.

Chapter Three

The Value Choices in Regulation

(i) Introduction:

There is a different kind of choice also to be made in deciding what method of regulation to use (defining regulation in its broadest sense to include quasi-regulation). Value choices lie at the heart of the decisions to use different governing instruments or even different methods of regulation. [12] These value choices are more than the simple ones often discussed in public debate -- debates between government intervention and deregulation, for example. They involve the kinds of choices made in the *approach to* regulation and in *the expectations about* the benefits to be derived from it. It will be useful to illustrate three such choices as a basis for further discussion about the methods of regulation. They are, as follows:

- Regulation (or any other governing instrument) might be used as a "safety net", as a means of protecting socially or economically disadvantaged citizens from the negative effects of marketplace transactions. Regulation of misleading advertising is an example.

- Regulation could also be used achieve a redistribution of resources. Canadian content regulation is an example.

- Regulation could be used to achieve a value or a quality of service. Regulations about the coverage of political campaigns or abusive programming are examples.[13]

The choice about values is one of determining whether regulation should provide benefits (particularly to the disadvantages) enact and maintain rights or be used to sustain certain social values. The implications of each choice are, as follow:

(ii) The Safety Net Approach - Using Regulation to Provide Benefits:

When we think of using regulation as a safety net, we have in mind the idea that laws and regulations are highly coercive and that minimum coercion produces the best possible society. But since the efficient operations of markets do produce problems, particularly for socially or economically disadvantaged groups and individuals, some governmental measures are necessary to ensure a measure of the good society for all citizens. Regulation is designed to allocate benefits or to provide compensation for harm.

What this means is that the purpose of regulation -- seen from the "safety net" perspective -- is the protection of the weaker segments of the community from the problems introduced by an efficient economy. The task for the regulator is to determine who is likely to be affected negatively by market forces and to arrange for some form of relief, that is, benefits to offset harm or compensation if necessary. The task for governments is to determine what level of service or amenities will be considered acceptable, and thus, by implication, which groups will be deemed eligible for the regulatory safety net. In the example of misleading advertising, most regulatory efforts are designed to provide relief to consumers. This usually takes the form of deterrence in the form of prosecution or harm. One can envision a situation where some measure of compensation might be assigned through a regulatory mechanisms to customers who have been misled.

Determining the basic acceptable level of amenities or quality of service is not an easy task for governments. In the case of advertising, how does one determine the line between legitimate salesmanship and misleading information? The choice faced by government is an unpleasant one. A decision to set the basic standard of service or amenities at a high level is a costly one. A decision to set the level more reasonably in terms of its economic and social cost is one that means that some groups in society will receive inferior service, be harmed in some manner, or enjoy a significantly lower standard of living than others. In the regulation of advertising, too high a standard of misleading advertising will choke competition and

freedom of information. Too low a standard will result in public harm and cynicism. Thus it is not surprising that many of the decisions in this regard are often made implicitly. We will return to this point later in the discussion, for it has important implications for broadcasting policy.

The task of the regulator using a safety net approach looks much simpler at first. If procedures can be designed to identify all the interested and affected parties to any decision, and more importantly to locate those least able to cope with the effects of any market transaction, then actions can be taken to ensure some measure of relief. Complaints about misleading advertising can be investigated, then followed by warnings and -- only if warnings have failed to produce the desired result -- by legal action.

Compensation for local broadcasters in the face of new superstations or even the introduction of cable in their communities is another example of what is done by regulators seeking to create a safety net. Broadcasters are not usually considered a socially or economically disadvantaged group, but when cable is introduced in smaller communities served by local broadcasting stations, broadcaster revenues can be severely reduced. In this situation, broadcasters can be (and have been) considered a (newly) economically disadvantaged group. The task of the regulators is then to determine the extent of the possible disadvantage and a reasonable means of compensating those involved.

Yet another example of regulators attempting to create a safety net is in regard to northern native communities. Here the group affected looks more like the common stereotype of a socially and economically disadvantaged group. Market forces (aided in this case by regulatory decisions) ensure that satellites will deliver signals for southern television stations to these communities, regardless of the impact of the new services on the social or cultural life of the community. Through regulation, or in this case quasi-regulation, measures have been introduced with mitigate some of the consequences of the new television services and provide compensation to native groups in the form of funds to establish a native alternative communication service alongside the newly available mass entertainment delivered by satellite.

A safety net approach to regulation has intrinsic attractions:

- With it, government intervention is designed to protect the most unfortunate, or at least those shown to be most worthy of protection.

- The cost of providing that protection is limited by the decision about who is genuinely worthy of help and what level of relief or compensation to provide.

- Relief or compensation is designed to deal with the immediate causes of discomfort, dislocation or unfair competition, and thus is limited.

At the same time, there are serious disadvantages to a safety net approach, or at least significant implications arising from the making of that choice.

First, an assumption is made in a safety net approach that some level of harm, some dislocation, disruption or maldistribution of resources is inevitable. For example, in deciding to approve satellite delivery of television signals, the CRTC also, by implication, gave its blessing to the problems that the new television service would cause. In licensing local cable services that import distant signals, the CRTC condones the inevitable erosion of local audiences for local services. In some circumstances, this regulatory acceptance of a level of disruption or harm is reasonable or inevitable. After all, the harm done by the introduction of cable to local broadcasters is offset by the value of the new imported services to the audience. Refusing to licence cable service for a small community simply to protect the broadcasters in that community is untenable, regardless of the economic harm posed to the broadcasters. In other situations, it is less easy to justify a safety net approach, partly because it often involves condoning harm. The introduction of mass-produced, southern-oriented television in remote northern indigenous communities is a case in point.

Second, a regulatory decision to provide benefits or compensation demands that all parties, including those to receive compensation, view their losses in monetary terms and

that they consider some form of financially-based compensation as a reasonable way of alleviating their problems. There are some features of life that cannot easily be conceived of in monetary terms, some losses or forms of disadvantage that cannot adequately be the subject of financial compensation. Moreover, the safety net approach to regulation implies a narrow sense of remedy, one which can usually be measured only in economic terms. How could one compensate Canadians financially for the loss their cultural heritage or of a broadcasting service that mirrors and extends it? The answer is not at all. Quebec was quick to point this out in early debates over broadcasting and its relation to cultural heritage. The current impasse on native land claims is another good case in point. No financially-based settlement can replace the loss of cultural amenities nor will money compensate the victims of serious environmental damage or social dislocation. There are features of social life that do not respond easily or adequately to the construction of a regulatory safety net.

(iii) The Redistributive Approach - Using Regulation to Sustain Rights:

The decision to use regulation to achieve a redistribution of resources reflects quite a different value choice. Fundamental to this decision is the notion that some basic level of service or amentities should be considered a public right to which all segments of the population are entitled. Of course, decisions are still required about what level of service or amenities should be considered as a right Nonethless, in dealing with redistribution, we are dealing with rights, not with benefits or compensation for particularly disadvantaged groups or individuals.

Broadcasting regulation (as it has developed in Canada) is based on the idea that certain rights do exist with respect to public ownership of the radio spectrum. Some of these legislatively entrenched rights are "high quality service" and service that "strengthens and enriches the cultural, economic and social fabric of Canada". Guaranteeing these rights -- viewing the radio spectrum as public property -- requires a redistribution of resources. After all, one cannot provide high quality broadcasting service without cross-subsidizing cultural production from the profits of more economically advantageous programming. One

cannot produce Canadian materials without redistributing the resources of the broadcasters to achieve this goal. Regulation provides one framework for making decisions to effect this redistribution. As such, it is indeed little different from an elaborate and specific taxation system or extensive programs of aid.

Although regulation is often seen as a substitute for the use of subsidies to support public goals, regulation itself provides for a level of subsidization of these goals. For example the requirement that pay television licensees not only carry a certain percentage of Canadian content (itself a form of subsidy) but also contribute a portion of their revenues to the production of Canadian material irrespective of their intention to air it, is both a requirement that licensees assume a commitment to a public goal and, at the same time, a type of subsidy program for Canadian program producers. Regulation often provides something akin to a subsidy for those providing products or services that would be uneconomic otherwise.

Expressing the point in terms of subsidies and cross-subsidies makes the value implications of a redistributive approach very clear.[14] The terms subsidy and cross-subsidy have taken on negative connotations because of some trenchant critiques of the cross-subsidieswhich serve no demonstrable public interest.Focussing on ross-subsidies highlights the interventionist aspect of any government policy (whether explicitly regulatory or designed to foster public interest or not). The argument against cross-subsidies designed to foster public interest goals goes as follows: No properly functioning market would support the existence of extensive subsidies or cross-subsidies. Economists argue persuasively that both introduce inefficiencies in markets and so they do. Subsidies and cross subsidies can be justified only because governments want to impose social or cultural goals upon market participants, goals that would not be met by a properly functioning and efficent market. However justified, meeting these goals sometimes has unintended side-effects, inasmuch as the efficient use and allocation of resources is also a social value, but one that is undermined by the imposition of non-market critieria for decision making. Often, using governing instruments such as regulation to effect redistribution involves trading one right (efficient use of resources and lowest possible cost to consumers) for another (cultural development).

Of course, subsidies and cross-subsidies are exactly what is intended with programs designed to deal with regional disparities, equalization payments, etc. They are also built into the licensing of cable as a monopoly for communities that include profitable and non-profitable service areas. Without subsidies or cross-subsidies, implemented through taxation or through regulation, it is hard to imagine any form of national economic partnership among the regions or any disadvantaged portion of a community receiving cable. It should be emphasized, however,that not all cross-subsidies are introduced by government policies by any means, and many cross-subsidies create market inefficiencies without any public reward. For example, if telephone companies were to subsidize the introduction of new specialty services by their rates for basic service, market inefficiencies would result. Whether these cross-subsidies had any net public benefit would be a matter for assessment and debate.

Canadian content in the Canadian broadcasting system cannot be justified on strict economic terms, the. It requires both subsidies and cross-subsidies to achieve what all governments to date in Canada have believed was necessary, a Canadian presence on that portion of the radio spectrum allocated to Canada. To conceive of broadcasting without subsidies or cross-subsidies designed to achieve social and political goals is truly a radical proposal and one that is not under discussion despite the current interest in deregulation.

Using regulation to achieve some level of redistribution has certain attractions.

- It is reasonable to consider some features of society as rights and to ensure some equity of access to them;

- With a redistributive approach, those who receive aid are considered partners in the social collectivity, not supplicants for aid;

- Certain public goals could not be achieved except through redistributive programs and/or public ownership.

But demonstrating the inherent attractiveness of a redistributive approach to regulation does not end the debate. It is still necessary to determine which subsidies and cross-subsidies are necessary and which are counter-productive from a social and political point of view. The cost of some subsidies and cross-subsidies may exceed the public benefit to be gained from them. The cost of administering programs designed to create subsidies or cross-subsidies may exceed the value to be achieved from the subsidies. Even if one accepts the idea that subsidies are necessary and inevitable, then, it is still important to determine which subsidies should survive a proper assessment of their costs and public benefits.

(iv) The Quality of Life Approach - Using Regulation to Support Social Values:

There are some social or political goals that are considered to be intrinsically worthy although they are not, strictly speaking, "rights" and nor do they require redistribution of resources (except incidentally). These are features of a "good" society that cannot be realized through the market, not even in the most efficient market society. Calling these goals "values" will serve to distinguish them from "rights" or "benefits" created through other approaches to regulation.

Human health and safety and environmental protection are good examples of such values. They illustrate the difference between "safety net", redistributive, and value approaches. It is easy to see why health is a value. Decisions are made in Canada to provide health care and protection for everyone. Of course, one could envision a system of health care that was designed as a safety net, to ensure only that the disadvantaged receive some health care benefits. Medicare in the United States is such a system and the contrast between the American approach and the Canadian one is instructive. Similarly, one could envision a program of subsidies (or cross-subsidies) designed to support health related measures. For example, health care could be tied to employment, as it is in some countries, and be financed through cross-subsidies within industry. Again, the contrast between this and the Canadian approach is instructive. Simply stated, good health care in Canada is considered to be a basic

value, established through legislation and through various publicly administered and funded health care and insurance systems. Woe to any Canadian government who misunderstands the differences in approach!

For historical reasons, in Canada public broadcasting is a value. [15] Of course public broadcasting is also partly supported through subsidies, and redistributive measures.. One could envision a public broadcasting system, however, that depended entirely upon program sponsorships and advertising or on licence fees for its support. Regardless of how it is funded, the point must be made that public broadcasting has been seen as necessary for the good of country as a whole. How it should be funded is a matter of public debate and its specific impact on market relations are seen as secondary questions.

Conceiving of a government that did not enact value-based legislation is difficult. The public expects that government actions will reflect their values. They expect legislation to follow and, historically, have supported the use of public ownership as a means of achieving social values. The electorate rebels when governments appear to renege on their commitments to established values -- when, for example, they try to convert a universal program of social benefits into a subsidy program or safety net for the disadvantaged only, or when they view environmental protection as something that can be traded in negotiations with the United States.

It is unclear, however, whether regulation is an effective means for dealing with values, or whether regulation is the appropriate mechanism for enacting value-based programs. If, as has been suggested above, regulation is oriented to the market and to private enterprise, then the tools available to a regulatory agency may well be the wrong ones to sustain widely accepted values. The flexibility offered through regulation creates suspicion that value commitments are being forgotten. The high level of interest group negotiation that occurs within the regulatory arena suggests to the public that values can be traded for economic benefits. The separate zone of governance created through regulation leads to a suspicion that accountability has been lost.

This situation is ironic because public corporations are mandated to implement policies to reflect a basic commitment to certain values. The CBC is a good example. Public corporations are usually regulated. The following points about the regulation of public corporations underline the problem being discussed here:

- Public corporations are pro-active in orientation; regulation is reactive. These two different orientations to policy implementation will inevitably clash, especially if the same standard of conduct is being applied to the public and private sectors under regulation.

- If indeed regulation provides a system of negotiation, then public corporations directly under the control of legislatures are crippled players, because their scope of negotiation is limited by their other relations with government and the public and because the orientation of regulation is to markets and private enterprise.

(iv) The Choice to be Made Between Different Approaches to Regulation:

A choice about methods of regulation is also a choice about the objectives for that regulation. Deciding which objective to pursue is acritical and should precede any decision about methods of regulation. The choice is between using regulation to confer benefits or rights, or to sustain social values. An examination of some of the often-stated objectives of the Canadian broadcasting system will illustrate the decisions to be made:

- It has been suggested above that public broadcasting falls into the category of a social value. Obviously, it is not a value that all Canadians share, although there is a long historical tradition of public service in broadcasting. An alternative view of public broadcasting is to see it as a safety net. From this perspective, the role of the CBC would be only to provide some compensation for those affected

negatively by market forces -- cultural producers and audiences with minority tastes. If governments were to take the safety net approach, the legislative mandate, and indeed all the operations of the CBC would have to be radically altered to conform more to a PBS model.

- Even less agreement exists about the status of Canadian cultural protection. In the example used above, it was suggested that Canadian cultural producers consider they have a right to "shelf space" and funding for production because the radio spectrum is a public resource also being used for private gain. Certainly broadcasting regulation has been designed to foster the cross-subsidies that would promote cultural production. It has been suggested recently that Canadians neither seek out nor want Canadian cultural production. Since cultural producers are certainly a group disadvantaged by market transactions, under a safety net approach, they could seek aid on another basis. They could argue that a cultural safety net is necessary, if they are to be able to continue to play any role in Canada in an era of cultural free trade. Viewing their contribution from the perspective of a safety net, however, would shift the orientation of government policy dramatically, since the obligations of private broadcasters to provide cross-subsidies in return for their use of the public radio spectrum would be dramatically reduced.

- What about access to the airwaves, the opportunity to speak and to be heard, on the air and with respect to broadcasting policy? Is this a right that can be claimed by Canadians, or a value that should be supported regardless of its specific costs and benefits, or simply a concern that is primarily directed to those groups who, by virtue of their status, are disenfranchised with respect to the use and control of media? Should we be concerned about the access of all Canadians to the airwaves? Or alternatively, should our concern be limited to those marginal groups in society who are unlikely to be heard unless extra support is given for their participation?

- What about the full range of broadcasting services available to urban Canadians? Is this a basic right for all Canadians, requiring extensive cross-subsidies so that these service can be made available to remote areas? Should we only be concerned about those groups within society who are unlikely to receive all available broadcasting services by virtue of their relative disadvantage? Should we retreat and simply let the market determine who receives the full panopy of broadcasting services and who does not? Is the availability of a full range of broadcasting services -- unlike education -- a value that should take precedence over either the market or the cost considerations of providing that service?

In fact, these questions have all been answered, although not necessarily in the way we might now choose to answer. Public broadcasting is still a value; cultural production is a right, but one that increasingly is being viewed -- for better or worse --from a safety net perspective; access provisions are mainly (with the exception of FM) limited to minority or disadvantaged groups; a decision has been made (probably without recognition of its significance) to consider the full range of broadcasting services as a basic right, at the cost of significant cross- and other subsidies. The problem for the Task Force is whether these are the right choices.

The meaning of reregulation lies here, rather than in some tinkering with ideas about substituting various programs of quasi-regulation for regulation. The decision about the objectives of regulation lies at the heart of how regulation (or its substitutes) will be structured. The mandates for regulatory authorities or programs of quasi-regulation will determine their scope of action. It is indeed true that fundamental shifts in orientation are being discussed, although the terms of that discussion have not been clarified sufficiently in the public mind.

Chapter Four

Different Methods of Regulation

(i) Introduction:

The conventional view of regulation is that it is conducted by an independent agency or tribunal with both quasi-judicial and administrative powers. [16] This agency has an arm's-length relationship with government. It commissioners are appointed. It is served by a technically expert staff. It conducts hearings, usually involving lawyers and cross-examination. Its deliberations are a matter of public record ,as are its decisions. Some rules of procedure are given, and some procedures must be followed or a decision can be appealed. Courts and legislatures oversee the regulatory process and set guidelines for policies to be implemented within it or rules for ensuring a proper assessment. Many of the regulatory reforms being advocated are posited upon this type of regulation and are designed to address its problems.

This picture describes some regulation in Canada, but not all by any means. The diversity of forms of regulation poses problems for the analyst, however. It is indeed difficult to develop recommendations for regulatory reform if that which is being reformed has many institutional and legal forms. If, however, the task is to examine different methods of regulation with the goal of recommending some of them, then it is necessary to identify the diversity of regulatory forms. Within this diversity, there may be a variety of different methods of regulation that should be considered as possible options for regulation.

There are three kinds of regulatory diversity that should concern us. One, which will be considered in the next chapter, is tied to the mechanism of action used in regulation. A second, which will be discussed in chapter six, reflects differences in institutional design at a very practical level. The questions to be asked in this case are: Who should function as regulators? What role should members of the public play? How is regulation to be combined with interest group negotiation? How much technical expertise is necessary? Would programs

of quasi-regulation work better than regulation as traditionally conceived? If so, which programs of quasi-regulation?

There is another, more basic kind of examination of the different forms of regulation tc be done first. In effect, what must be done first is to identify the various approaches to policy implementation that legitimately can be called regulation. In the second chapter of this report, this was accomplished by locating some of the common characteristic of regulation and even quasi-regulation as possible governing instruments.

But even individual regulatory agencies take different approaches to the conduct of their work. They set rules, or decide matters on a case-by case basis. They create an extensive body of general regulations, including very detailed ones, and rely upon an inspectorate. Or they deal with specific applications on a case by case basis and use "conditions of licence" as a means of providing specific "rules" in each case. They are designed as tribunals, and refer ever issue to a public hearing process in which specific groups are given status as parties to the decision. In this case, the regulator views him or herself much like a judge would, as a neutral arbitrator of the issues and conflicts brought before the tribunal. Another approach is to bring the "opposing parties" into the same room. and instread of scheduling a hearing, to attempt to negotiate a compromise among them.

Any one regulatory agency may adopt any or all of these approaches for different decisions, as regulatory agencies have significant discretion with respect to their procedures of operation. In the case of the CRTC, for example, there are detailed rules concerning politica broadcasts, and music on FM stations. In general, however, the CRTC today relies upon its licensing process and condition on licences to implement its mandate. The agency generally functions as a tribunal, but in the case of the Task Force on Sex Role Stereotyping, the agency was involved in the creation of a body that would "mediate" the conflicts concerning program content, and supervise changes in program content.

The point, then, is not to identify specific agencies in terms of a single approach, but tc illustrate the implications of any agency taking one or more of these approaches to regulation. What is the result of a regulatory authority depending upon a large number of

specific rules? How does reliance upon conditions of licence, rather than regulations, change the impact of regulation? When is a tribunal appropriate, and when should some form of mediation be considered? These are questions to be faced in the creation of a new agency, and also in the review of the operations of any existing one.

In this chapter, the emphasis will be on locating the specific differences between different methods of regulation, so that these methods can be compared with each other. It is assumed that all share the common characteristics of regulation, as described above. It is also assumed (but will be discussed later) that some of these differences in methods of regulation apply to what we have called "quasi-regulation" as well.

(ii) Regulation by Rule:

Regulation by rule is the most ubiquitous type of regulation. [17] It involves government officials engaged in the application of rules. A maze of regulations usually exist in every department of government. These regulations, many of which are picayune, govern every facet of corporate activity. The application of rules takes place on a daily basis, as a routine activity of government. It generally involves departmental officials who function as regulators despite being in positions of line authority. Often the regulatory aspect of their job is a part-time preoccupation and they also function to support government-industry co-operation, carry out educational functions or assess requests for governmental assistance.

Sometimes also field inspectors are involved. These officials also can be involved in educational programs or in assessing requests for government aid. The regulatory authority, in the sense of the body formally mandated to apply regulations, is usually a single individual or group of individuals. No formal regulatory structure connects them and no separate zone of governance is officially created, although it is expected that officials functioning in a regulatory capacity will have a continuing relationship with those they regulate and some degree of independence from the daily pressures of the legislative and executive process.

The number of regulations that can be applied in any situation is generally very great. When firms complain about the regulatory maze and the potential burden of regulatory paperwork, they can point to large volumes of regulations, usually requiring some record keeping, to support their claim. The resources for applying the regulations are often disproportionately low. Field inspection, analysis of the data submitted on the forms, monitoring and other possible regulatory functions are generally undertaken on a limited basis. As a consequences, the potential scope for regulatory discretion is very great. Someone must decide which of the many possible regulations to enfoce with vigor, which paper work to demand and assess, which problems to monitor. Generally these decisions are made in response to complaints (often from industry competitors). The cost of conducting a general assessment of which regulations to pursue, or even of sifting out the unnecessary regulations, is often beyond the resources of those empowered to conduct the regulation. Not all the regulations should be viewed as restrictive, however, despite the fact that they may impose a paper burden. Some are directly connected to access to granting programs and function as "gates" to those programs.

Regulation by rule is only discretionary at the level of the application of regulations. The regulators seldom are directly involved in the generation of the rules themselves. In situations calling for a new standard or regulation, or for the alteration of existing rules, the regulators refer the problem further up their line of authority, and eventually in some cases, back to the legislative process. For this reason, and because so many rules are applied (or not) as a result of discussions in the continuing relationship between regulator and regulatee, regulation by rule can easily be subject to influence-peddling. The legislator who is concerned that one of his powerful constituents have been offended by the vigorous application of a rule, simply makes a phonecall. The senior official who is concerned with the success of a program of economic development suggests that flexibility is required. The regulator himself who is concerned that he maintain a good working relationship with the industry he regulates agrees to bend a rule to accommodate an industry problem. Nothing in the structure of regulation prevents these situations from occurring, because regulation by rule is necessarily highly discretionary and occurs behind closed doors.

In this context, regulations become a kind of currency that can be used by industry and government officials alike in maintaining or altering the relationship between them. If there is too "light" an application of the rules, government loses credibility and control over its funding and inspection programs. The result is often public scandal. If there is too vigorous an application of rules, the relationship between government departments and their constituent industry groups comes to a standstill and economic development programs fail to produce their desired social and political results. The maze of regulations has a positive benefit for both parties to this kind of regulation. They provide some means of securing co-operation on the part of both parties that can be made operational on a daily basis and as part of the routine activities of both.

Regulation by rule is not a public process in the usual sense of the term, but it does have mechanisms to ensure accountability. Since regulators function in this case as line officials within the executive branch of government, they are accountable to their superiors - who are not regulators -- for their decisions. Since changes in regulations must be referred to non-regulatory officials or the legislature for decision, the discretion exercised by individual regulators is limited to the application of rules. Finally, since legislators normally set at least the framework for the rules, and sometimes the specific regulations themselves, representative officials can be said to supervise or control the policy making functions of regulation. None of these measures to ensure accountability involves members of the disinterested public, of course. This type of public accountability accompanies regulation by rule to the extent that misapplication of rules attracts public attention and public controversy places officials on notice that something must be done.

(iii) Regulation by Permit:

Regulation by permit-- the granting or revision of licences and permits -- is a form of resource management. [18] Unlike regulation by tribunal, however, no formal agency is

involved although appeal boards are common. Instead, particular officials are empowered tc make an assessment and issue the nercessary approvals., permits, licences or certificates. Regulation by permit is usually done in conjunction with regulation by rule, partly because the same officials are often involved in both types of activities. It is a departmental activity.

Regulation by permit is subject to extensive negotiation. Negotiations with an applicant for a permit are usually project specific and permits are issued on a case-by-case basis. The assessment process usually involves the circulation of the proposal submitted by the applicant to several departments within government for their assessment and recommendations. Generally, members of the public are not involved and interest group negotiation takes the form of negotiations between departments within government, who represent the interests of their industry and public constituents. Once a decision has been made to approve a permit, negotiations with industry often occur about the conditions that will be attached to the approval of the permit. These negotiations resemble regulation by rule in that a number of possible options (including compliance with other regulations) are on the table for discussion and agreement. The activity of granting a permit provides a formal opportunity to do what is often done informally, to gain industry co-operation with government policies in return for specific benefits including among others approval of a permit.

Regulation by permit is also highly reactive. Formal rule-making, standard setting and regulatory hearings seldom accompany regulation by permit. Instead, an assumption is made that the best state is a minimalist state, one that finds a method of co-operating with the initiatives proposed by industry. The permit, and the conditions that may be attached to its approval, represent regulatory hurdles, but they also serve to air problems in advance and identify the resources that should be provided by government to compensate for any harm created by granting a permit. For example, permits are offered for environmental pollution and for major construction projects that have environmental effects. In conducting an assessment (sometimes using public hearings, but usually not) before granting a permit, a department identifies what funding programs will be necessary to offset any negative effects cause by the pollution or the construction. The various participant government departments

can then take steps to put the necessary resources in place, by funding wildlife enhancement programs (in the case of pollution permits) or alcohol treatment centres(in the case of major construction projects). Because government departmental officials are usually eager to facilitate the industrial activity that requires a permit, they go out of their way to ensure tha the costs of these measures -- if born by the company and not the government -- have been negotiated in advance of granting the permit. In effect, the activity of granting a permit sanctions an activity and an acceptable level of harm that will result from it. Thus data is usually provided by the applicant, assessed only against known and established standards

The decision to hold hearings in conjunction with regulation by permit often is a sign of a limitation or failure of the process, a failure to reach a compromise within government or with industry about the approval of the permit or of the conditions that will be attached to it. In areas where controversy can be predicted, in pollution control for example, a mechanism for holding those hearings and dealing with controversy is usually available in the form of a legislatively mandated appeal board. This board has minimal staff, and sometimes its commissioners are appointed on an ad hoc basis. It meets only as required, only as an indication of the failure of the more routine process of regulation by permit. Unlike regulatory agencies, which they can resemble in structure and procedures, appeal boards are often made up of political appointments. Since they act on in cases of public controversy or disagreement from within government, their connection to the political process is seen to be justified. After all, political representatives, or their delegates, are legitimately empowered to make the value choices necessary to resolve public controversies.

The nature of the assessment used in regulation by permit should be understood. Only a few departments who regulate by permit or make recommendations on the merits of specific applications maintain an extensive research capacity. Great dependence is placed upon the applicant to produce the necessary assessments and to submit the data upon which decisions can be made. This is not to suggest that company-sponsored studies fail to be reviewed in regulation by permit (although this happens in some cases). Rather, the review is problem-centred and often draws upon previous knowledge of similar applications rather than an independent scientific review. For this reason, it makes sense to see regulation by

permit as an extension of the engineering of a product or project. The focus of the assessment is often not upon the necessity or desirability of granting a permit but upon locating the costs involved and assigning responsibility for them.

(iv) Regulation by Tribunal:

Regulation by tribunal is what is conventionally studied by analysts of regulation and requires little discussion here. It is worth noting some differences between the Canadian and American situation with respect to regulation by tribunals however. First, many Canadian tribunals only have powers of recommendation or alternatively their decisions can be overturned by cabinet directive. As a result, Canadian agencies are considerably less independent than their American counterparts, and are instead more fully integrated into the policy process. Second, only some regulatory tribunals have any significant research capacity or expertise. Often regulation by tribunal work more like regulation by permit in practice, since applications are circulated to various departments for their recommendation a a means of gaining an assessment. Many regulatory tribunals lack a monitoring or inspection capability.

As noted above, regulatory procedures in Canada are much more flexible than they are in the United States. Without an Administrative Procedures Act or any reasonably accessible means of seeking judicial review of administrative decisions, only an imprecisely defined standard of fairness can be applied. Regulatory decisions are seldom overturned by the courts, either for procedural or substantive reasons. Public records are not always kept; hearings are sometimes discretionary; reasons are not always given for decisions; cross-examination is permitted only in some tribunals. A number of studies have resulted in recommendations for the reform of tribunals and their procedures, seeking something similar to the fairness provisions contained in American law concerning the actions of tribunals. To date, few of these recommendations have been accepted, and indeed, the argument can be made that the direction of regulatory reform is quite the opposite. A number of measures have been introduced that reduce the independence of some agencies (the CRTC is a good example), rendering its actions more like regulation by permit than regulation by tribunal.

(v) Regulation by Mediation:

Regulation by mediation often involves a board or committee whose procedures and decisions resemble those of a tribunal. Regulation by mediation is quite different from either regulation by tribunal or permit, however. Regulation by mediation is a form of "self-regulation". It is the formal mechanism for bringing those with opposing interests together to seek a resolution of their conflicts. A variety of different approaches can be taken to deal with such conflicts. Boards are used to review the activities of professionals; labour relations boards in many provinces conduct arbitrations; environmental mediation involves bringing industry and advocate groups into a common process to designed to produce a decision that is acceptable to all of them; consensus or voluntary bodies set standards and sometimes apply them. What unites these diverse bodies and allows us to consider them as a specific form of regulation, is their common focus on conflict resolution between interest groups and their use of members of the interest groups themselves to conduct the arbitration process.

It is important to note just what is and is not involved in regulation by mediation. First, from the examples used above, it is clear that regulation by mediation ("self-regulation") can occur inside the governmental sphere and can include participation of governmental officials. It can also be fully independent of government, in the sense that no government officials are involved or that a private or voluntary association conducts the regulation. Second, it is clear that regulation by mediation is designed primarily for interest group negotiation and only secondarily involves a technical assessment. In this sense (only) regulation by mediation is more like a civil court than an tribunal, since experts are used in civil courts by the parties in dispute.

Third, membership on the body of regulators determines which interests will be subject to negotiation, at least in the first instance. Thus, without the participation of labour groups, government officials, consumers or major producers, one could not expect a resolution of conflicts to include the concerns raised by any of these groups. Finally,

regulation by mediation may or may not include legal sanctions or penalties for those who fail to comply; it may or many not include a mechanism for enforcement of regulatory decisions, other than perhaps, the actions that aggrieved parties might take through the courts. Put in its simplest terms, regulation by mediation is a mechanism for reaching accommodation between different interest groups who share one common problem or concern. In cases where mechanism of enforcement are considered necessary, regulation by mediation can be combined with regulation by rule or tribunal or with recourse to the courts.

As noted above, regulation by mediation can be considered "self-regulation", in

spite of the fact that government officials sometimes participate or that bodies such as the labour relations boards function as an arm of government or that government officials sometimes participate directly. [19] By encapsulating those with conflicting interests in the process of decision making, the government effectively removes itself as the arbitrator of conflicts. The participation of government officials is then only in terms of their specific interests. Regulation by mediation is coercive, but the coercion is a product of the compromise between interest groups, not government. When regulation by mediation involves an arms length relationship to government, it provides a formal mechanism for government sanction of the decisions that result.

There are two results of regulation by mediation: First, through regulation by mediation, governments to insulate themselves from conflict. In dealing with controversial issues, such as the information content of broadcast programming or labour-management relations, this insulation is politically advantageous. Second, regulation by mediation is only an instrument of government policy in the weakest sense of the term.

(vi) The Choice of Methods of Regulation:

Historically in Canada at least, there has been a tendency to move from regulation by rule to regulation by permit. Then, when the permit granting process is seen to be insufficiently public or fair, regulation by tribunal replaces regulation by permit. But truly independent agencies pose problems for governments. They are procedurally fair, but are only partially politically accountable. A number of measures are then introduced to bring the tribunals back under the control of Cabinet or legislators. In the United States, legislative "oversight" is used, to give legislators significant control over decisions of tribunals. In Canada, the measures are Cabinet appeal of tribunal decisions, government directives, legislatively specific regulatory mandates and creation of policy research capacity within a competing government department Even then, some critics have argued that regulation by tribunal is not politically accountable. They seek (and are currently successful in getting) measures that will reduce the scope of regulatory discretion even further by making specific regulatory decisions subject to Cabinet directives and by shifting from regulation by tribunal to mediation.

There are serious dangers in these last two steps. If regulation by tribunal is made accountable by its procedures and hearing process, then Cabinet review and overturning of specific tribunal decisions diminish accountability. Decisions made in a public forum, using reasonably fair procedures for assessment, are second-guessed by a body whose

deliberations are closed and whose reasons for decisions are never given.

The introduction of more regulation by mediation is legitimately viewed as a step away from government involvement in regulation. In effect, with regulation by mediation, governments become just one of several interested parties in the mediation. Regulation by mediation takes many forms, however, some more publicly accountable than others:

- In some cases of regulation by mediation, interested and client groups are involved in the mediation process and represented in its decisions. In this kind of regulation by mediation, the *locus* of decision making is changed from government to a body outside government. The same range of interests and views are included however.

- In other cases of regulation by mediation, particular groups are eliminated from the decision making process. As such, this latter form of regulation by mediation changes the primary objective of regulation from protection of the public interest to mediation of conflicts within and between sectors in the market economy.

In the broadcasting sphere, advertising regulation comes closest to the first approach. In the Advertising Standards Council, consumers and members of the public are represented, along with broadcasters, advertisers and their agencies. As well, in the case of advertising standards, the decisions taken by the Council are self-enforcing, in that broadcasters who are signatories to the codes agree not to air offending advertising on their stations. In practice, of course, the Advertising Standards Council is somewhat less representative than it is in fact in theory, given its relationship with the Advertising Foundation and industry associations. Nonethless, the Council does provide a working model of relatively accountable regulation by mediation.

The voluntary codes adopted by other segments of the industry are considerably less accountable. Neither consumers nor members of the public are guaranteed representation as interest groups in the creation of these codes. The conflicts to be resolved through industry code writing include those between the industry and the the CRTC and even those between industry and public. Neither group is represented in the negotiations directly. Instead, both the CRTC and the public stand outside the process, as watchdogs perhaps, threatening by implication a different form of regulation should regulation by mediation prove unsatisfactory. In the worst-case scenario, industry codes, developed without the

participation of members of the public or the CRTC, become regulations that are not reviewed but only enforced by government. In this scenario, industry groups set their own rules, bu also have little responsibility for implementing or enforcing them.

Chapter Five

Attitudes toward Regulation

(i) Introduction:

The second way of distinguishing different forms of regulation is by the attitude towards regulation taken by the regulators. . [20] This is particularly apparent recently with respect to the CRTC, whose current Chairman stresses that the agency is "supervisory" in approach, rather than "regulatory". In effect, quite different attitudes are taken by regulators about their functions. Regulators can be "pro-active" or "initiatory" in attitude, and see regulations as a device for inserting public policy goals in a sector of the economy. Regulators can see themselves, alternatively, as managers, as co-ordinating the relationship among participants in a sector or in relation to new technologies. Finally, regulators can see themselves a facilitators of market relations, as supporting the infusion of market-like pressures into a sector of the economy that is, by virtue of its technology and economic structure, not subject to the normal constraints of supply and demand.

Regulations are meant to deal with particular types of behavior. They can alter these types of behaviors directly, by prohibiting them for example, or indirectly, by changing the incentives and disincentives of those being regulated. Some regulatory actions resemble planning exercises. In this third case, regulators manage a resource, using an overview of the regulated sector to identify problems and possible solutions, much the way managers of corporations do. These three mechanisms are described here as "initiatory regulation", "market intervention", and "managerial regulation".

(iv) Initiatory Regulation:

Initiatory regulation is what the public thinks of when it expresses frustration about the failure of regulators to control abuses in any sector of the economy. It is also usually what industry regards as the least desirable form of regulation. Initiatory regulation involves

setting overarching goals, values or objectives to be achieved through regulation (including quasi-regulation), and then passing regulations or designing specific measures to achieve those objectives. The regulation on abusive programming is an example of a simple initiatory measure. The FM policy is another example of initiatory action; Canadian content regulations are a third. Canadian ownership regulations are an example of an initatory measure based on a government directive.

(ii) Market Intervention:

Market intervention involves implementing policies through altering the conditions influencing market behavior. Market intervention is initiatory when it seeks to restructure market conditions (for example in the case of the FM policy). Other market intervention is designed simply to create incentives for particular actions and to discourage others by placing a high cost on them. The distinguishing feature of market intervention is its use of the market mechanism as the means of controlling industry behavior. The core assumptions behind using market intervention as the mechanism of regulation are, as follows:

- significant social benefits result from a properly functioning market system.
- some form of government intervention is necessary to keep markets freely operating as they should.
- the efficient use and distribution of resources is itself a primary social value.
- other social values can be realized only in a properly functioning market system, because markets allocate resources efficiently and because competition produces maximum possible diversity and innovation.

The argument for structurally oriented market intervention rests on an analysis of how markets work, or rather, how market failures occur. Regulation is seen to correct these failures by altering market condition. There is an absence of a commitment to social or value goals. Instead, the argument for regulation is, as follows: Particular market failures have stimulated the demand for market regulation. For example, market regulation is said to be justified when conditions of monopoly or oligopoly are created by technological and economic factors over which individual firms have little control. The argument goes as follows: Nothing halts the exploitation of consumers and unfair competitive practices in these monopolistic

markets. Hydro companies can charge any price for their services, if no one else can offer access to the necessary resource. Telephone companies could pick and chose, for arbitrary reasons, whom they will allow to have access to their lines and services. Cable companies can erect significant barriers to other possible competitors, including measures that preclude or discourage innovation and the development of new markets.

Market intervention is said to stop these abuses of market relations by creating an equivalent to the competition normally found in free markets and, in doing so,to protect the public interest in having just and reasonable rates, fair access to services, and industrial growth and innovation. Other problems are seen to respond well to market intervention, for example, chaos and disruption of services resulting from too many competitors using a scarce resource. Market intervention is also used to deal well with the limited availability of a resource, considered necessary but subject to alienation as private property; to deal with situations where the public requires a particularly high quality service; or to deal with situations of potentially restrictive trade that courts have found difficult to handle.

A number of questions must be answered (using the example of broadcasting) in order to predict the success of structurally-oriented market intervention, however:

- Are the monopolies being regulated actually established by technical and economic constraints, or are they a product of regulatory licensing of a particular service on an exclusive basis?

- Is market intervention the appropriate way to guarantee access to service, or does the dampening effect that regulation has upon innovation itself limit access by limiting the number and range of services available?

- Do regulated monopolies hold back on research and development because they have no competitors and no need to innovate?

- Could market intervention ever stimulate research and development or innovation?

- Can regulation eliminate cross-subsidies that protect no demonstrable public interest?

- Is the radio spectrum really a scarce resource, or a public one, given the new

technological equivilents to the spectrum as means of generating and distributing signals?

- Are there methods other than regulation for controlling chaos and disruption on the radio spectrum (technical interference from competing stations), were regulatory control of market structures to be loosened?

- Could international agreements with respect to allocation of radio frequencies be adhered to, in the absence of regulation?

Not all market intervention is designed to change the structure of markets. Some involves changing the incentives and disincentives for particular behaviors by introducing additional costs and benefits. Programs of quasi-regulation are not designed to restructure markets but only to provide incentives for particular behavior within any particular market. Both quasi-regulation and regulation create "artifical" market constraints as one mechanism of action, however. Since these constraints are "artificial" , a question is legitimately raised about the cost of market intervention and about the effectiveness of market regulation in controlling industry behavior.

In a regulatory context (including quasi-regulation) compliance with policy objective and control of industry behavior are considerably easier to achieve if industry is desirous of the end result. Two examples illustrate the point:

- The Broadcasting Fund created incentives for Canadian cultural broadcasting production but it cannot be said to have strengthen the Canadian content of programming in the private sector yet. The problem is that little is to be gained by industry from programming strong Canadian content, in spite of the incentives provided through the fund.

- Market intervention in FM was more successful when the FM broadcasters were losing money and when market intervention created favourable conditions for growth. Today, FM broadcasters have less to gain from market intervention and FM regulation is less successful.

(iii) Managerial Intervention:

Management differs from market intervention because of its emphasis on the *distribution* of resources to be achieved through regulation. [22] The mechanism of action in managerial regulation is resource planning. Planning involves establishing an overview, a series of objectives and a detailed assessment of the costs and benefits of specific actions. It requires the regulator to know who will be affected by any decision and to have regulatory control over all sectors and participants within any sector. For this reason, managerial regulation has certain requirements if it is to be successful:

- It demands identification of all the client and affected groups in order for a proper assessment to be conducted.

- It demands that all relevant groups (and sectors of the industry involved with the resource) fall under the regulatory jurisdiction of authority empowered to conduct managerial regulation.

- It demands funding for groups that would otherwise not be in a position to represent their views.

- It demands a broad perspective on the part of the regulators who function in the management capacity, to recognize issues that are not easily represented by interest groups or unlikely to be represented in any formal way through the hearing process.

- It requires the regulators to have a comprehensive overview and detailed assessment of the sector being regulated and a coherent view of the objectives to be met by regulation.

Since we are dealing with planning through regulation, however, planning in managerial regulation is reactive, involves significant negotiation, and is highly flexible.

(v) **The Choice to be Made:**

The choice of the mechanism of regulation is a difficult one, because serious difficulties exist with each. The four examples of initiatory regulation illustrate the difficulties with this particular approach:

- After much public controversy and pressure from the House Sub-committee on

Sexually Abusive Programming, the CRTC enacted a regulation on abusive programming. To date, the public concern has not been assuaged by the creation of a regulation, as few public groups believe that the regulation, as written, is precise enough to be enforceable or broad enough to deal with the scope of the problem. The assurances about the limited applicability of the regulation given tc industry in public statements before the regulation was enacted have effectively undermined public confidence in it.

- The FM policy is implemented by a series of specific regulations designed to make implementation of the policy practical. Since the CRTC wanted to see a difference between AM and FM, and between FM stations, it had to find a way to describe those differences specifically. It chose to use types of music and program formats as a way of illustrating differences in the quality of listening it sought tc achieve with the FM policy. The distinctions became increasingly unenforceable in practice, with the growing reluctance of industry to meet the underlying policy objectives.

- Canadian ownership and control is not viewed as a regulatory problem, although the mechanism of action is regulation. Through an order-in-council, the ownership restrictions designed to guarantee Canadian ownership in the broadcasting system were made into law in 1969. The CRTC plays only a supervisory function with respect to Canadian ownership, in effect monitoring compliance with the law instead of regulating its implementation.

- Canadian content goals have been implemented through regulations, promises of performance and conditions on licences. Requirements for Canadian content are not viewed differently from other regulatory measures, and indeed Canadian content regulations are simply some of the many regulatory controls placed upon broadcasters. As such, they have been neither more nor less enforceable than other regulations.

Of these four examples of initiatory action, only the policy on Canadian ownership and control is an unqualified success. Interestingly, it combines a legislated and specific objective with regulatory supervision. The scope for agency discretion is non-existent. The regulatory agency simply examines each ownership transaction to ensure that it complies with the law.The FM policy is much less successful as an initiatory action. The FM policy was compromised by the difficulty of implementing it.

Whether Canadian content policies have been successful is a matter of debate. The assessment depends largely on the standard of success being used. Compared to a situation of having no content regulation, the regulations have been very successful. Are private broadcasters now actively pursuing excellence in Canadian production for the majority of their broadcast hours? Of course not. Would other approaches be more successful? Perhaps.

Market intervention that is designed to change the structure of markets or the incentives for behavior within them is only succesful if industry is co-operative or responsive to the incentives being provided. Incentives and disincentives only alter behavior if they are sufficient to offset all of the costs of compliance with policy goals. One could not expect fullsome support for market intervention from all market participants in any case. Invariably market intervention will have its defenders and detractors in every particular instance (depending upon who is likely to benefit) and its defenders will resort tc the public interest to justify their stance.

While market intervention can be successful in its own terms, it fails with respect to diversity in programming and information. The assumption is often made that diversity in markets created by competition will be reflected in a diversity of information and program content. The CRTC has had great difficulty with this assumption, as indeed have the courts. [22] Policies which discourage cross-ownership have been considerably more difficult to use in practice than in theory. Specific ownership transactions, which have the demonstrable result of reducing diversity of ownership, only sometimes constrain diversity of information or types of programs in demonstrable ways. Stations with different ownership broadcast the same music or television shows. The problem for regulators in using market regulation to stimulate diversity of program content is that the link between diversity produced by competition and diversity of information (and types of programming) is tenuous and indirect At best and rarely in this situation, market intervention is a means to an end.

The problems with a managerial regulation arise in three situations. First, new technologies cannot easily brought within the ambit of resource management even by legislation. Jurisdictional problems, which are caused by changes in technology, are compounded by political disputes. Second, when jurisdiction and resources for research are inadequate, it is difficult to ensure that the "managers" have an overview. The recent development of a research capacity within the Department of Communications is intrinsically a good thing, but it does not guarantee that the regulators will use research to inform decisions about resource management. Finally, in times when public sentiment leans towards

deregulation, having a strong vision is likely to cause problems for regulators.

Managerial regulation depends upon the active participation of all interested client groups. Some groups cannot easily be represented in a regulatory forum as an interest or client group, since the interest they represent is diffuse or since their membership is not easily identifiable. It is easier for a consumer group to appear to discuss the costs and availability of specific services than it is public interest group to discuss the national heritage. It is easier for a group representing the interests of specific cultural producers to press their claims than it is for an advocate group to discuss the cultural significance of broadcasting. Of course, the latter groups do exist and present their views at CRTC hearings. Their presence is much more sporadic than that of interest groups and their briefs much harder to deal with from the perspective of managerial regulation.

Would programs of quasi-regulation work better than regulation? Only sometimes. In many cases, quasi-regulation falls victim to the same problems as regulation, inasmuch as it too involves market intervention, effective management and the imposition of initatory measures to achieve policy objectives.

Chapter Six

Options for Regulation

(i) Introduction:

The third choice to be made in methods of regulation is the design of the institution or organization that will be responsible for implementing public policies. This choice is as relevant to quasi-regulation as it is to regulation, since programs such as the broadcasting fund, special taxation systems, voluntary codes (and even contracts between users of public resources and government) all require some mechanism of administration and take some institutional form. In this chapter, the term regulation refers to both regulation and programs of quasi-regulation.

(ii) Who should Make the Assessment and/or Decisions:

The most extensive debate in the literature has been about the question of *who* should conduct assessment and make decisions to implement various policies. [22] There are five options, each with particular advantages and disadvantages:

Government -- through Cabinet, Legislators or Committees:

Serious problems exist with Cabinet involvement in regulatory decision making. Directives or orders-in-council are never debated as legislation but have the same effect. A "sunset law" on directives and orders-in-council in broadcasting might provide Cabinet with the same degree of discretion, but ensure that legislative-like measures are debated as legislation if they remain in force for any length of time.

Since regulatory measures are designed to implement government policies, the involvement of the legislators who create those policies, ensures that the policies are enacted as envisioned. Legislative bodies can also represent a spectrum of views and interests, simply because representatives of different parties are involved.

An example of a relatively successful use of an all-party legislative sub-committee used to perform regulatory assessments was that of the Ontario Select Committee on Hydro. With a small but expert staff, active and informed members, a clear mandate and a public record of their procedings, this committee monitored Ontario Hydro's actions as well as any regulatory authority might. It is important to note that their work was done in conjunction with a regulatory authority (The Ontario Energy Board) who recommended decisions on rates and specific development projects. Hydro is designed to respond to the policy initiatives of the government. The sub-committee performed an important role by ensuring that the priorities established in the legislature were recognized and implemented by Hydro.

There are many examples of less successful legislative committees. Parliamentary committees are often little more than staging grounds for public controversy and debate. They act without expertise and without resources to follow up upon or implement their recommendations. These committees act in competition with regulatory agencies, yet have few of the powers normally granted to regulators. In this regard, it is interesting to compare the transcripts of the House Sub-committee on Sexually Abusive Programming with the submissions to the CRTC on abusive programming. By comparison, the briefs to the CRTC are cautious and reflect a somewhat different position about the need for the regulation of abusive programming.

Permanently Appointed Bodies:

With some security of tenure and some insulation from the pressures of the legislative and executive process, permanently appointed bodies can develop expertise, take measures to control influence-peddling and institute procedurally fair means of conducting assessments and reaching decisions. They are, of course subject to capture and to the various pitfalls described in this report.

Ad Hoc Committees:

Ad hoc committees take two forms. Some are appointed on the basis of their expertise. These committees extend the resources available to government for assessment and are not generally subject to "capture". They often lack an overview of the policies they implement, however, and are only suitable for for

tasks which can be clearly defined and accomplished within a reasonable timeframe. Members lose the independent perspective that makes them valuable when they are fully integrated into the policy process for any length of time. Ad hoc commmittees are used extensively on health and agricultural safety issues and might well be used productively in broadcasting to conduct assessments of issue like bias in program content or cost separations and subsidies in the various services provided through cable.

The second type of ad hoc committee is made of of individuals represent a variety of views (not necessarily interest groups) on a particular problem. The ad hoc committee is like a mini-public hearing, except that its deliberations are not always public and its examination of issues extends well beyond that possible in a regular public hearing.

Such committees are only as effective as their members, who are caught in a dilemma about whether to represent the interests of their constituent groups or to work together as a group to create a series of coherent recommendations.

The danger with an ad hoc process lies in its strength -- the ability of a group of independent experts to second guess (and be innovative in relation to) the routine decisions of regulators or departmental officials.

Mediation Groups:

Mediation groups are simply committees or appointed bodies whose members are chosen to represent various interest groups. Their functions and advantages have been discussed at length in Chapter five.

Three types of mediation bodies should be distinguished:

- The first is the professional affairs committee of a professional association. These are individual members who are delegated to deal with problems, abuses and conflicts within their profession. The conflict resolution in their adjudication procedings is that between the interests of the profession as a whole and those of its individual members.

15. Other programs of quasi-regulation must be made as publicly accountable as the regulation they replace. Monitoring and review of the effectiveness of programs of quasi-regulation is essential and should be conducted by an outside body.

16. Both regulatory and quasi-regulatory bodies should make use of ad hoc expert committees to develop expertise in their assessments. Their reports should be published.

17. Political accountability of regulation demands pre-emptive policy making and a well-delineated, limited and publicly accountable method of Cabinet intervention. Directives should be limited to general policy matters. These directives should be subject to "sunset" clauses, and should either lapse or be debated as legislation by a specified date.

Implementation of the recommendations listed above requires:

*** re-evaluation of current aspects of regulation to determine what can be deregulated or made subject to programs of quasi-regulation.**

*** extensive revisions to the Broadcasting Act.**

*** a new mandate for a restructured regulatory authority, specifying the objectives of regulation.**

*** the enactment of new legislation to cover public broadcasting.**

*** the enactment of legislation to implement measures designed to sustain values (as should be done in the case of Canadian ownership)**

*** enactment of new legislation establishing programs of**

quasi-regulation.

*** re-evaluation of measures that increase Cabinet powers in relation to the regulatory authority.**

A quasi-judicial adjudication of specific cases of alleged misconduct often provides a forum for the airing of conflicts about acceptable practices as well as a mechanism for redress of complaints. Because the forum is quasi-judicial, the decisions have the appearance of impartiality. But decisions of a professional affairs committee lack the credibility of civil or criminal court decisions.

Only some professional associations have the power to enforce their decisions or enact significant punitive measures against offenders. Press Councils for example, generally rely on moral suasion, not sanctions to deal with offenders.

- The second type of mediation group is found in voluntary trade organizations. A voluntary committee of members assumes the task of dealing with conflicts between other members or between the members and the public (or government). Because it operates within a trade organization, this type of committee can achieve a coherent and consistent approach to policy issues. Conflict within the organization is more difficult to handle, however, since alienation of any specific group of members diminishes the effectiveness of the organization as a whole. Thus enforcement of decisions about disputes is often left to the good will of those involved.

A good example is the Canadian Association of Broadcasters, who set and implement most of the codes affecting broadcasting content. It is difficult for the CAB to develop a formal mechanism for handling conflicts affecting some but not all its members Disciplinary action against an individual member (or group of members) is potentially divisive. At the same time, the CAB must be prepared to demonstrate how disputes arising from the codes are being resolved to maintain the credibility of their codes.

- The third type of mediation body is a consensus organization. Consensus organizations are generally used for setting standards. Membership on consensus bodies is determined by the conflicting interests involved in any issue. The purpose of a consensus organization is to provide a formal mechanism for resolving conflicts and reaching "consensus". Of course, consensus is possible only on some issues, and consensus bodies often fail

to reach a decision on many of the problems they discuss.

As well, consensus bodies deal best with questions of general applicability and least well with specific abuses or infringements of their standards. Usually consensus bodies simply set voluntary standards, leaving the problem of adopting, implementing and enforcing these standards to some other group.

Authority by Delegation:

In many instances, a body mandated to conduct assessments and/or make decisions will delegate portions of its authority to other groups. The advantage of this practice is that it allows a parliamentary committee or regulatory tribunal. for example, to assume responsibility for variety of tasks even when they have limited capacity, desire or resources to do them.

For example, the CRTC relies now relies heavily upon industry groups or standarc setting bodies to develop codes for program content, because they are reluctant to appear as censors of programs or information. Parliamentary committees or departments regularly separate out tasks that can be delegated to non-governmental bodies because they lack an expert assessment capability.

This approach is like "contracting out", except that the contract in this case is given to a publicly accountable body rather than a private consulting group. Of course, a private consulting groups are also delegated to conduct assessments for government. The danger in delegating authority to other groups, whether private or public, is that the accountability of the original group is diluted and the public nature of the assessment process is often compromised.

(iii) the Powers Granted:

The powers granted to any administrative body charged with implementing government policy have always been a matter of public debate. The positions in that debate are well known.

Powers to set policy:

The argument for quasi-regulation is often made on the basis that only representative bodies should make policy decisions. In both regulation and quasi-regulation, this practice is harder to follow than its advocates acknowledge.

The process of policy making invariably involves a series of successive delegations of authority. With each successive delegation, more emphasis is placed on *how* to implement policies and less on the policies themselves. Regulation by rule is regulation that has been delegated extensively, so that a single individual is responsible only for the application of regulations. In the case of disputes about the applicability of a regulation -- policy disputes -- the official refers the matter back up the chain of command for instructions.

In the discussion of regulation by rule, the point was made that considerable discretion exists at the level of the regulatory official. It is possible to discern a pattern in the decisions made by regulators, an implicit stance towards ill-defined policy questions in some cases and outright opposition to official guidelines in others. Regulation by rule, which is the least discretionary of all regulation, illustrates how policy making cannot be separated from regulation.

Powers to Make Decisions:

The public generally expects regulators to make decisions and act on them. This gives a great deal of power to regulatory authorities who deal with large sectors of the economy or a great variety and number of issues. Too much, some suggest.

Powers to Make Recommendations:

Many regulatory authorities in Canada only have powers of recommendation, at least in some aspects of their activities. This approach to regulation turns a regulatory authority into a permanent inquiry or royal commission, by separating the assessment function from that of decision making. Governments keep a much tighter handle on regulators and on the implementation of public policies by limiting the powers of the "regulators" to that of making recommendations. At the same time, both governments and regulators suffer from a serious lose o

credibility by the separation of assessment from decision making.

Examples are easy to find: the Restrictive Trade Practices Commission, the early years of the Ontario Energy Commission, the House Sub-committee on Sexually Abusive Broadcasting. The existence of a formal assessment process raises public expectations about actions that will be taken, but those receiving recommendations have often opted for a different plan of action.

(iv) The Mandate:

The mandate given to any regulatory body is critical, since it determines the scope of jurisdiction and action. Little has been written on the question of how regulators should be mandated, except with respect to deregulation. Nonethess, it is possible to examine the options:

Broad and Encompassing Mandate:

There is a difference between the broad scope of a regulatory mandate and the range of objectives that regulation is supposed to achieve. A broad mandate is often a vague one. It allows the regulator to take a variety of actions on many related issues. From a regulators point of view, this broad scope of action is necessary.

Vagueness with respect to regulatory objectives poses a problem, however. Without legislatively specific objectives, nothing determines the priorities for regulation. The orientation of the regulation can change, without notice, to reflect the preoccupations of the day.

The CRTC has always had a broad and unrestrictive mandate. This has given the agency the power to consider almost any aspect of program content, use of resources, cost of service or access to the airwaves. In a regulatory scheme, such a broad mandate is necessary. If any one approach fails -- to provide support for cultural producers, for example -- another can be found.

At the same time, the mandate given to the CRTC is not very specific about the objectives for regulation. It is relatively easy, then, for regulators to rearrange their priorities and to re-orient the agency from one perspective to another.

Set of Related Objectives:

The apparent solution to these problem is to create a specific mandate. This action would reduce the discretion of the regulator considerably (making regulation more like a program of quasi-regulation) and would focus the regulator's efforts on a pre-determined set of goals and priorities. The difficulty with this solution is that it limits the regulator with respect to the tools necessary to engage in negotiations effectively.

A good example of these difficulties is contained in the popular suggestion that cable rates should be deregulated (within the existing mandate of the CRTC, which includes cable regulation) Rate regulation in cable has posed an administrative burden for the agency but has had little significance for the consumer.

Rate hearings are important, however. Rate hearings provide the CRTC with the opportunity to set conditions for the kind of the service provided by the cable companies. Rate regulation is a tool of regulation: What represents an additional cost of often less than a dollar for the consumer, represents a significant infusion of capital from the perspective of the cable company and thus a strong incentive for improving service.

Mandating a Single Objective:

Reducing a regulatory mandate to a single objective changes regulation into a program of quasi-regulation.

(v) Implementation:

How the regulator choses to implement the mandate determines the nature and degree of coercion in regulation (or quasi-regulation). There are five choices:

Delegation:

Regulators occasionally delegate other bodies to implement their policies. The Task Force on Sex Role Stereotyping is an example. The regulator then assumes a supervisory role. Delegation can be useful if the regulator is prepared to assume full responsibility as soon as it becomes clear that the delegated body is failing. This requires extensive monitoring, an activity that can be as costly as regulation.

Action through Licensing:

The regulator usually assumes responsibility for implementing regulations. This is considerably easier if the activity subject to regulation has not yet commenced. For example, it was considerably easier to regulate offensive programming and sex role stereotyping in pay television before any services was licensed. Unfortunately, this was not done. It is important to stress that he CRTC is not required to approve all applications that meet the minimum standard of acceptability (even when there are no competing applications) and thus *can* set standards in terms of what should be licensed.

Action After the Fact:

It has been suggested that dealing with problems as they arise promotes flexible and responsive regulation. The greater reliance now placed on conditions of licence is an example of "regulation after the fact". It allows the CRTC to design standards to deal with specific problems and is often viewed as deregulatory. Infractions of conditions on licences are normally dealt with only in licence renewals or if a special hearing is called. Regulations -- regulations before the fact -- permit the agency to take action on problems, without placing the status of the licence into question. They are generally more fair and less flexible than conditions on licences.

Supervision:

The current mode of CRTC regulation is supervision. Supervision is like regulation after the fact, in that it is designed to be responsive to complaints and problems only when they come to the attention of the regulator. It is an attempt to come to terms with the function of regulation when deregulation is preferred.

Supervision, however, requires monitoring, if the resulting regulation is to maintain public credibility and monitoring is not easily compatible with a deregulatory approach.

The Contract Model:

An alternative to either action or supervision is to use contracts negotiated between licensees and regulators. This shifts the responsibility for implementing regulations (which are written in to the contract) to the licensee, who assumes a legal responsibility for the provisions in the contract. A legally binding promise of performance is like a contract.

Like supervision, contracts require monitoring. In civil law, monitoring is generally left to private parties. If contracts or legally binding promises of performance are used, regulators assume the status of parties in a dispute.. The question then arises -- what about other parties to a dispute, members of interested public interest groups for example? In a regulatory proceding, these groups have status and can raise questions about compliance. In civil law proceding, measures would be necessary to ensure that public groups retained their capacity to monitor and respond to lack of compliance. Public interest groups have played a critical role historically in monitoring compliance with regulations.

(vi) Enforcement:

In the public mind, regulation is only as effective as its enforcement. From a regulator's perspective, enforcement is a much more complex problem. What are the options?

The Regulator as The Enforcement Authority:

Widespread confusion exists between regulation and law. Courts *are* capable of enforcing all their decisions as they are written, but relatively few issues are resolved in court. Only a small proportion of potentially actionable behavior is ever examined in civil court and, indeed, in a comparison of regulation and courts, one might view policing as more akin to the task of regulators. Regulator are in a better position to know what actions run contrary to the rules (laws)

than courts, but are considerably more constrained one with respect to acting on their knowledge. In regulation, enforcement is generally designed for deterrence. As such, relatively few infractions every reach the stage of formal disciplinary measures.

Delegation of Authority to Enforce:

The regulator is dependent upon the government for enforcement, unless compliance is achieved through negotiation. Issues that the regulator might want to seen resolved are not necessarily raised, however, when government is responsible for the prosecutions. As well, there is no guarantee that governbment will take action. The recent "Bannerman" case is a good example.

Recall the situation with unlicenced satellite dishes several years ago, when two licensing authorities (the CRTC and the DoC) could not agree who was responsible for initiating the politically unpopular act of enforcement. Enforcement is always politically unpopular with those benefiting from the infringement of regulations, a group that sometimes includes large segments of the population.

The Contract Model:

In the contract model, enforcement remains an instrument of deterrence, given the necessary involvement of government, the costs of legal action and the negotiated nature of the relationship between regulator and licensee.

(vii) Programs of Quasi-regulation:

Different programs of quasi-regulation are designed to structure incentives and disincentives for particular types of behavior differently.

Codes vs Regulations:

The advantage of using codes rather than regulation to deal with questions of offensive program content is that it removes the regulator from any activity that could be considered censorship. The question arises, however, whether agency action before the fact (before specific programs have been aired) constitutes censorship if the same standards apply to all programming. Is the regulations

precluding abusive programming a form of censorship? Many community groups feel that even the regulation does not go far enough to deal with offensive programs. Codes seem insufficient to deal with the depth of their concern. If neither regulation nor quasi-regulation deal effectively with problems in program content, other governing instruments should be considered.

The Broadcasting Fund and Telefilm Canada are specific taxation programs; The Canada Council is supported by subsidies; the CBC is supported through legislation and general taxation revenues.

Specific Taxation Programs vs General Taxation:

The mechanism of specific taxation programs is effective when the objective can be related to the tax (justification for the tax is possible) and when specific groups of individual beneficiaries can be identified clearly.

Specific Taxation Programs vs Subsidies:

Two dangers exist in relying on subsidies. First, recipients of aid are made intc "welfare" recipients by subsidy programs. They lose their "right" to support and become supplicants for government largesse. Second, in times of restraint, subsidy programs are often curtailed.

Some programs of quasi-regulation provide incentives for action; others disincentives. In environmental regulation, an effluent charge is an example of a disincentive; a clean-up fund of an incencentive.

Incentives vs Disincentives:

Regulation operates through an elaborate system of incentives and disincentives. By creating programs of quasi-regulation for the same purpose, the incentives or disincentives are made explicit. As noted above, this does not end potential influence-peddling or, in the case of disincentives, the problems of enforcement.

In any case, incentives in programs of quasi-regulation must be designed to benefit clearly identifiable groups and must be sufficient to produce the intended results. Quasi-regulatory disincentives must be tied to clearly identifiable types of behavior to be enforceable.

Chapter Seven

Recommendations

Regulation, like any governing instrument, weaves a strong web of relationships and actions. Changing any aspect of a regulatory regime creates problems elsewhere, for regulatory actions are often carefully balanced in relation to each other. Any one action affects many other decisions. This is the reason why regulation is so hard to dismantle or reform. To deal with the problems of making any significant change, the recommendations are stated in terms of principles to be applied.

The recommendations are designed in two packages, each constituting a coherent program of reform. As such, specific recommendations are of little significance . Out of the context of the program of reform, they cease to have their intended effect. The first package of recommendations assumes a blank slate with respect to options. The second set of recommendations examines what is possible if the existing structure of broadcast regulation is left intact, but the relationship between its participants is changed.

The authors of this report have taken the position that despite the problems, significan change is possible, and indeed desirable.

Recommendations
Assuming a Blank Slate

1.Regulation is suitable in the case of securing *rights*; quasi-regulation is more appropriate for providing *benefits* to socially or economically disadvantaged groups; and *values* should be sustained through programs of legislation and taxation, not regulation.

2. A basic choice is necessary, then, about the status of each objective for the Canadian broadcasting system -- whether it should be viewed asdealing with rights, benefits or values -- in order to evaluate the options for regulation, quasi-regulation and deregulation.

3. Regulation which now is designed to sustain basic values should be replaced with legislation. (Supervision of compliance with legislated goals can be by a regulatory body, however)

4. Programs of quasi-regulation should replace regulation when a specific target group, a single objective and mechanism of action can be identified and when assurance is provided that they will be enacted.

5. A regulatory regime *is* necessary in dealing with the private use of a scarce public resource for the purposes of its efficient and fair management.

6. The distinction between what is and is not regulated in the private sector should be on the basis of the nature of the *service* (programming, non-programming etc.) offered.

7. There is a compelling argument for deregulation of private market transactions if these transactions are not themselves invested with public interest and if ownership regulation is not critical tool for regulators.

8. Regulatory control over particular markets should be sought only when *all* components of that market can be brought under the regulatory umbrella. If not deregulation should be considered. If particular market sectors are deregulated, however, some specific regulatory or programs of quasi-regulation measures will necessary to ensure that public policy objectives are met.

9. With or without significant deregulation there is a need for reassessment and rationalization of the points of regulatory intervention (eg: regulation of access to the radio spectrum, regulation of distribution of signals etc.) to ensure that any one measure does not impede the effectiveness of others.

10. Programs of deregulation must be carefuly designed so they do not simply reduce the capacity of regulators to manage public resources effectively.

11. Regulation is designed to deal with problems in markets and with the private sector only. Public corporations *should not* be regulated in the same manner and in conjunction with private sector companies.Nonetheless, public corporations should be held accountable, perhaps through the mechanism of an all-party parliamentary committee. Of course, generally applicable laws and regulations -- such as that on abusive comment -- should be applicable to public corporations in the broadcasting sector.

12. Regulation can be conducted through applying conditions on licences as well or instead of formal rules, but it must be pre-emptive in the sense of proceeding from well-delineated policies. Such policies should be formally enunciated and subject to public hearings and debate.

13. The option of contracts between government and licensees should be investigated further, and in the interim, promises of performance should be made legally binding.

14. Codes can replace regulation in dealing with issues of program content only if the standards in the code are set by consensus organizations that are publicly accountable and if the codes can be made self-enforcing.

Recommendations

Within the Existing Structures Regulation of the Canadian Broadcasting System

1. Regulations that are now intended to sustain basic values should be replaced with legislation. Current orders-in-council (eg. Canadian ownership of broadcasting undertakings) should be enacted as legislation. Supervision of compliance with legislated goals should be through the regulatory agency.

2. A regulatory regime *is* necessary to deal with the private use of a scarce public resource for the purposes of its efficient and fair management. Necessarily, regulation should be preceded by assessment and implemented on a comprehensive and pre-emptive basis.

3. There *is* a compelling argument for deregulation of private market transactions if these transactions are not themselves invested with public interest and if ownership regulation is not critical tool for regulators.

4. Regulatory control over particular markets should be sought only when *all* components of that market can be brought under the regulatory umbrella. If not, limited deregulation of specific aspects of the current regulatory program should be considered.

5. These deregulatory measures must be carefully designed so they do not simply reduce the capacity of regulators to manage public resources effectively.

6. There is a serious need for reassessment and rationalization of the points of regulatory intervention (eg: regulation of access to the radio spectrum, regulation of distribution of signals etc.) to ensure that any one measure is not impeding the effectiveness of others.

7. The distinction between what is and is not regulated in the private sector should be on the basis of the nature of the *service* (programming, non-programming etc.) offered.

8. Regulation is designed to deal with problems in markets and with the

private sector only. Public corporations *should not* be regulated in the same manner and in conjunction with private sector companies.Nonetheless, public corporations should be held accountable, perhaps through the mechanism of an all-party parliamentary committee. Of course, generally applicable laws and regulations -- such as that on abusive comment -- should be applicable to public corporations in the broadcasting sector.

9. Regulatory policies should be formally enunciated and subject to public hearings and debate.

10. Codes of standards for program content should be developed by consensus standard setting bodies and made self-enforcing.

11. Public interest intervenors should be eligible for funding through the mechanism of cost awards similar to those used in telecommunications.

12. Promises of performance should be made legally binding.

13. Regulatory authorities should make greater use of ad hoc expert committees to develop expertise in their assessments. Their reports should be published.

14. Political accountability of regulation demands a well-delineated, limited and publicly accountable method of Cabinet intervention. Directives should be limited to general policy matters. These directives should be subject to "sunset" clauses, and should either lapse or be debated as legislation by a specified date.

These measures will require:

* revisions to the Broadcasting Act
* enactment of a Canadian Broadcasting Corporation Act
* enactment of legislation on Canadian ownership

* enactment of legislation designed to sustain other basic values

* reassessment of the mechanisms for achieving public accountability through Cabinet Directives

* reassessment of ownership regulation and cable regulation

* reassessment of regulations for AM, FM, cable and specialty services to deal with the resulting changed regulatory parameters of action

* reassessment of the distinction between pay and specialty services

* changes in the rules of procedure to institute cost awards to eligible public interest groups

* re-evaluation of the reliance upon codes to deal with issues of program content and measures to ensure such codes become publicly accountable and self-enforcing.

* revisions of the promise of performance to make them conditions of licence (as is done now in FM)

References

The author would like to acknowledge the significant contribution, in the form of critical comments on this report, made by Ellen Baar. Any remaining errors, problems or omissions are, of course, entirely the author's responsibility.

1. The issues addressed in the literature on regulation in the United States and Canada are different, with the American writers usually assessing the option of deregulation (Peltzman, 1983, Noll and Owen, 1983), while Canadian authors tending consider forms of reregulation and regulatory reform (e.g. Schultz,1978; Cairns and Green, 1979; Stanbury and Thompson, 1982; Economic Council, 1981; Special Committee on Regulatory Reform, 1981; Pritchard, 1982). The American literature focusses on regulation primarily as an economic problem, in terms of strategies of market intervention (Noll and Owen, 1983, Jaskow and Noll, 1981), and in terms of its costs and benefits. In contrast, three types of regulation are often distinguished in Canada, economic, political and social regulation (see, for example, Schultz 1978; Doern and Phidd, 1983, Economic Council, 1978, 1979, 1981), and most regulation in Canada is said to have a political dimension which obscures any simple discussion of its rationale and benefits.

In both jurisdictions, questions of the accountability of regulatory bodies have been raised (see, for example, Cutler and Johnson, 1975, Roman, 1982), but the mechanisms for achieving this accountability are very different in the two countries. In general, the emphasis in the discussions of accountability in the United States have been informed by the theory of public choice. Regulation, seen from the perspective of public choice theory, is subject to capture by more dominant groups engaged in interest group negotiation (Noll and Owen, 1983). To the extent that such capture is seen to be endemic to regulation, discussion of the captive nature of regulation is then used as an argument for deregulation.

Partly because regulation is seen to have political and social goals in Canada, and because the alternative to regulation is seen to be regulatory reform, the issue of capture in Canada is dealt with by a series of proposals (and resulting debate) about alterations of regulatory procedures (Roman, 1982, Economic Council, 1981; Trebilcock, 1978), the legal status of regulation (Law Reform Commission, 1980, 1985) and of agencies and the relationship between regulatory agencies and legislative bodies (Janisch, 1978, 1979; Doern, 1978, Hartle and Trebilcock, 1982; Doern and Wilson, 1974). This discussion has been also extended to encompass questions about federal-provincial jurisdiction (Schultz, 1978).

Not every Canadian commentator accepts as beneficial the political basis of regulation, however. Some argue that such a situation is "historical mud" (Stanbury and Thompson, 1982), and that regulation should be reshaped to ressemble the American approach -- economic regulation or market intervention -- more closely, and then assessed in terms of its merits in terms compatible with an economic assessment of the market effects of any non-market variable.

2. The approach called 'governing instruments" (see Trebilcock, et. al. 1982) is chosen as the framework for the analysis offered here for a number of reasons. First, it provides a perspective of regulation as simultaneously an economic and a political activity without questioning the legitimacy of either. Second, it takes account of the variety of regulation as it now exists in Canada, without basing the analysis initially on a proposal for reform. Third, it approaches regulation from the point of view of those who mandate or call for it (or call for its reform), by beginning the discussion with a description of the policy options available to governing bodies to achieve their goals. Finally, it avoids any simple polarization of the options open to government, either in terms of regulation vs deregulation or in terms of

regulation vs regulatory reform, while leaving open the possibility that some non-regulatory option might be chosen as a substitute for regulation. The disadvantages of the governing instruments approach are that it tends to underplay questions of procedure and legal process that pertain to regulation only, and that it locates the reasons for regulation simply in the decisions taken by policy makers. To deal with the first disadvantage, in later chapters of this report, a discussion of regulatory reforms dealing with procedural and institutional design is included. A discussion of the reasons for regulation is beyond the scope of this paper (see, however, Mahon, 1979) but could not be encompassed properly by a governing instruments approach.

The governing instruments approach used here is different, however, from a perspective on regulation which views various "governing instruments" and types of regulation as more or less coercive (e.g. Doern and Phidd, 1983). In this perspective on regulation, governments are seen to choose not only a type of action, but also the level of intervention they intend. The options are "direct" vs "delegated" (MacDonald, 1985) interventionist and non-interventionist, coercive vs persuasive (see, Hood, 1983; Pal 1986[forthcoming]) Various types of governmental action (including regulation) are then classified along a continuum between these variables.

The decision to avoid classification or regulation and its substitutes in terms of the level of their interventionary effort is based on two factors. First, as MacDonald (1985) and Arthurs (1985) have pointed out, none of the options available to governments about the choice of a governing instrument represents a clear example of the distinctions between drawn between. for example, exhortation and coercion, or intervention vs non-interventionist approaches. Regulatory agencies have relied upon exhortation more or less, depending upon the climate and context within which they make a particular decision. Some apparently non-interventionist options in fact involve considerable governmental input. Second, as Arthurs emphasizes(1985), the factor of "political will" is a critical one with respect to regulation or any of its substitutes, but such a factor cannot be captured even by categories of "direct" vs "indirect" regulation or exhortative, coercive or interventionist characteristics. Finally, in this report, an assumption is made that the type of regulation (or its substitutes) most appropriately chosen should be determined by the nature of the task to be done -- not its so-called coercive or interventionist characteristics.

3. Several authors support use of a broad concept of regulation, generally viewing it as a political process with a variety of objectives and forms. (see, particularly, Doern, 1975, 1978, the Law Reform Commission, 1980, Brown-John, 1976, Macdonald, 1985). Each of these sources offers an alternative schema for the classification of various types of regulation.

4. The status of regulatory authories as formally and usually legally mandated bodies is problematic. An extensive discussion of how regulatory bodies function within the realm of law, and the use of traditional court-based remedies in connection with regulation is found in Mullan (1985). MacDonald notes that "to evaluate all forms of regulation against a standard drawn from idealized conceptions of the legislative and adjudicative processes generates an artificial symmetry and simplicity, leads to misguided attempts to legislatize and judicialize all governmental activity, and induces commentators to discount the importance of less formal and less visible regulatory processes" (pg 55- 56 in mimeo)

5. In the same vein of argument, Roman suggests that the use of regulatory agencies tends to "depoliticize" the regulatory process. (Roman, 1982)

6. The point being made here goes well beyond that of the "capture" of regulatory agencies by powerful interest groups (see, Noll and Owen, 1983, Trebilcock, 1978) for two reasons.

First, in Canada, with many agencies there is considerably less evidence of the movement of employees from the agency to the regulated industry (and back) than there is in the United States, and interest group lobbying, while highly significant, is nonethless much less openly practiced (Reschenthaler, 1978). The phenomenon of "capture", then, certainly exists to some extent, but it is difficult to determine how much and when particular decisions can be said to be the result of "capture" and when they are not. Second, even if lobbying and interchange of personnel were to be limited, the same phenomenon that has been described as "capture" would exist, because a sociology of proximity would account for the sharing of ideas and solutions to regulatory problems that occurs between the regulator and regulated.

7. The high degree of variation in regulation is noted by Doern, who stresses that, "it is important ...to attempt to develop some broad understanding of the regulatory function before becoming mesmerized by the myriad of regulatory units" (Doern, 1974, pg. 19). See also Boyer et al (1979),MacDonald, 1985, Brown-John, 1976, and Mullan (1985) who notes that "...administrative tribunals actually perform all major governmental functions"(pg. 1).

8. This procedural variability, while having some advantages, has been a matter of some concern. See Kane (1980), Mullan (1984), The Law Reform Commission (1980) and Roman (1978, 1982).

9. The "negotiated" nature of regulation has been discussed by several commentators. Doern (1978) quotes Vickers who characterizes regulation as "...a mutual transaction: persuasion, authority, bargain and threat move from the governed to the governors, no less than from the governors to the governed" (pg 1). Schultz speaks of the collegial nature of agency decision making, as does Doern (1974). MacDonald (1985) notes that "...normativity also arises from stabilized interactional patterns, from contract, from conventional understandings of 'the way it is done' from mediational processes, from the 'invisible hand' and from the extrapolation of adjudicative decisions by way of precedent." (pg 53 in mimeo). He also draws attention to the role of implicit forms of regulatory sanction: " ... a more subtle and, in the long run, more effective kind of sanction may be characterized as attitudinal or, put affirmatively, conditioning and belief. (pg 58 in mimeo)

10. The traditional rationale for effective regulation is provided by John Turner, who is cited in Kane (1980): "We deliberately delegate to these boards and commissions a certain range of policy decisions that have to be made, falling within a general area of competance. We do this because we want a certain independence in those decisions and because we want to withdraw the decision making power to a certain degree from the political arena, and because ministers and departments do not have the necessary opportunity and time in certain cases to deal with and to address these problems. (pg. 44)

11. For a discussion of alternatives to regulation being considered here under the term "quasi-regulation" see, Reschenthaler (1978), Trebilcock(1978), Emond (1985)Joskow and Noll (1983)Baumol and Oates (1971), Ayres and Kneese(1969) Leontief (1970) and Kneese and Schultz (1975).

12. The value debate in regulation has been characterized in a number of different ways. For example, the Economic Council approaches the value question by locating the various rationales for regulation and, in general, by posing two central values for regulation, efficiency and equity. (1979). Chapman and Quinn (1982) locate three potentially conflicting value orientations: redistribution, civil libertarian concerns for individual freedoms fairness concerns related to imbalnces in interest group representation. Doern (1974)has drawn attention to the value questions relating to nadministrative justice in regulatorey decision making. Evans (1982) critiques the reliance upon values derived from economics. The

analysis presented here is a summary of that published by the Royal Commission on the Economic Union and Development Prospects for Canada (Salter, 1985, see also, Salter, 1983)

13. A good example of how regulation can be conceived as a safety net is found in Levin (1975). Chapman and Qunin (1982) emphasize the redistributive element in regulation. Boyer et al.(1979) discuss some of the problems in dealing with quality of life regulation, specifically the difficulty of quantifying externalities.

14. Baseman (1983), Melody (1979), Bolter (1984) and Lesser (1977) provide different views of the cross-subsidy problem.

15. Hardin, Herschel, A Nation Unaware.

16. For problems in arriving at an appropriate definition and analysis of social regulation, see L. Salter, "Evaluating Social Regulation: Back to Basics" (mimeo) 1985.

17. The characterization or regulation in terms of its process (rule, permit etc) is not meant to describe different types of regulatory bodies specifically, since rule-making activities are carried out by many different bodies, and the process of permit granting described here is sometimes put into action by a regulatory tribunal. Rather, the typology charactizes different approaches to regulation that might be undertaken, and draws attention to the different ways in which even formal regulations and the granting of permits is done. This typology also assists in identifying the different forms of accountability that are attached to each approach.

18. For a description of permit granting as related to standards and regulation see Salter (1986).

19. For further discussion of code setting and regulation by mediation, see Salter and Anderson (1985)

20. Despite the political and social forms of regulation in Canada, most commentators have limited their analysis primarily to economic regulation. (Cairns, 1980; Reschenthaler, 1976; Ostry (Economic Council), 1978; Schultze (1978); and the Economic Council, 1981). Janisch (1978) discusses the pro-active role of regulatory bodies from a wider perspective, however, and some of the Law Commission studies (see, particularly, 1980) emphasize some of the managerial functions of regulation.

21. R. v. K.C.Irving Ltd. et. al. (1974), 16 C.C.C. (2d) 49 (trial); (1975), 23 C.C.C. (2d) 479 (N.B.S.C., App. Div.); [1978] I.S.C.R. 408 (S.C.C.).

22. A number of authors discuss accountability in regulation, and in particular, the importance of procedural reform. (see, for example, Kane, 1980; The Law Reform Commission, 1980; Janisch, 1978; Langford, 1980 and 1982);Roman, 1982 and Mullan, 1985).

23. for further discussion of various types of mandates, see Salter (1981)

24. for discussion of alternatives to regulation by tribunals and contract approaches, see Emond (1985) and Franson et.al. (1983).